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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia Homeowners,

Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Lewis H. Goldfarb and Ruth S. Goldfarb, individually and as representatives of the class of Reston, Virginia homeowners, hereby respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court and its findings of fact (Appendix A, *infra*, pp. 1-15) are reported at 355 F. Supp.

491. The Stipulation of Facts agreed to by the parties is not officially reported but is set forth at pages 16-20 of Appendix A. The opinion of the Court of Appeals (Appendix B, *infra*, pp. 1-24) is reported at 497 F.2d 1.

JURISDICTION

The judgments of the Court of Appeals were entered on May 8, 1974 (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Are bar associations which promulgate a minimum fee schedule exempt from the price fixing prohibitions of the antitrust laws because the restraint on competition is among the members of a "learned profession"?

2. Does a restraint of trade by attorneys in the fixing of fees for title examinations in connection with obtaining mortgages on real estate in Northern Virginia, substantially restrain commerce among the several States, where the undisputed evidence shows that a substantial portion of these mortgages involve (a) loans made from persons outside of Virginia, and/or (b) guarantees by agencies of the Federal Government headquartered in Washington, D.C., and/or (c) the purchase of a home by a non-resident of Virginia?

3. Is the Virginia State Bar exempt from the antitrust laws under the doctrine of *Parker v. Brown* for its role in a price fixing arrangement utilizing minimum fee schedules even though there is no statute authorizing the promulgation of such schedules, and where the only independent state agency involved, the Virginia Supreme Court, did

not approve either the fee schedules themselves, the reports of the State Bar which led to their adoption, or the opinions of the State Bar which provided the enforcement mechanism for obtaining adherence to such schedules?

STATUTE INVOLVED

The statute involved, the Sherman Antitrust Act, 15 U.S.C. §1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

STATEMENT

A. FACTS

On October 26, 1971, the named plaintiffs in this action, Lewis H. and Ruth S. Goldfarb, contracted to purchase a $54,500 home in Reston, Virginia. The contract provided that the closing would take place at the offices of A. Burke Hertz, a Virginia attorney, who maintained his office in Falls Church which, like Reston, is in Fairfax County (App. A, p. 16).

As a condition of obtaining a mortgage for their home, the Goldfarbs were required to obtain title insurance to cover the mortgagee's interest (Exhibit 32, ¶15, sec. 7).[1] Under ethical opinions issued by the Virginia State Bar,

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[1] References to Exhibits are to the Exhibits admitted in evidence, with numbers 1-32 having been admitted by stipulation.

the giving of an opinion as to the state of a title to real property cannot be done by a title insurance company but must be done by a private attorney. Therefore, on November 23, 1971, the Goldfarbs wrote Mr. Hertz concerning the possible utilization of his services to perform the required title examination, as well as for other matters relating to the purchase of their home (Exhibit 2). Their letter indicated a desire to minimize the cost of obtaining title insurance and noted that their realtor had estimated that an attorney would charge them approximately $522 for the title examination alone, the amount as determinated by the fee schedule of the local bar associations. On December 8, 1971, Mr. Hertz replied, indicating that it was "the policy of this office to keep our charges in line with the minimum fee schedule of the local Bar Association" (Exhibit 3).

Thereafter, the Goldfarbs sent letters to 36 other attorneys in Northern Virginia to inquire about fees for title examination services (Stip. ¶ 6, App. A, p. 17). Nineteen written replies were received (Exhibits 6-24), all of them indicating adherence to the fee schedule not only by the responding attorney, but by other members of the bar as well. These responses left no doubt that the efforts of the Goldfarbs to obtain a title examination for less than the prescribed minimum fee would fail. Therefore, at the January 15, 1972, closing on their house, the Goldfarbs utilized the services of Mr. Hertz and were charged $522.50 for a title examination – precisely the amount calculated under the minimum fee schedule.

The minimum fee schedule referred to by these attorneys was promulgated in 1969 by the defendant Fairfax County Bar Association in conjunction with the bar associations of Loudoun and Arlington counties and the City

of Alexandria (Exhibit 29). For title examinations, the minimum fee is 1% of the first $50,000 of the loan or purchase price, whichever is greater, one-half of one percent from $50,000 to $100,000, one-quarter of one percent between $100,000 and $1,000,000 and a negotiated amount thereafter (Exhibit 29, p. 25).

The requirement of adherence to these minimum fee schedules is imposed by the Virginia State Bar. The State Bar, which was created by the Virginia Supreme Court pursuant to statutory authority, is an integrated bar, meaning that every attorney licensed to practice in Virginia must be a member of it and pay annual dues to it (Stip. ¶¶ 9 and 11, App. A, p. 17-18). In contrast, the local bar associations which actually publish the fee schedules are purely voluntary organizations of attorneys who practice in a particular locality (Stip. ¶ 13, App. A, p. 18).

The Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operation of the State Bar. The State Bar is required by statute and court rule to investigate alleged violations of these standards of conduct and to report its findings to a court of appropriate jurisdiction which undertakes any disciplinary proceedings (Stip. ¶ 11, App. A, p. 18). Relying upon the authority given to it by the Virginia Supreme Court to issue opinions on questions of ethics, the State Bar has issued Opinions 98 and 170 (Exhibits 30 and 31) which, in substance, state that it is unethical for an attorney habitually to charge fees below those suggested in a minimum fee schedule, and that sanctions may be imposed by the State Bar against an attorney who violates that ethical proscription. Thus, the threat of sanctions for a violation of Opinions 98 and 170 stands behind the minimum fee schedules promulgated by the local bar associations.

In addition, the State Bar issued reports on the subject of minimum fee schedules in 1962 and 1969 (Exhibits 26 and 27). Those reports included suggested local fee schedules that were the basis for the minimum fee schedules adopted and published by the local bar associations. In fact, the suggested fees for title examination adopted by the Fairfax County Bar Association in both 1962 and 1969 were virtually identical to those suggested in the State Bar Reports.

B. PROCEEDINGS IN THE DISTRICT COURT

On February 22, 1972, the Goldfarbs filed suit in the United States District Court for the Eastern District of Virginia, Alexandria Division, on behalf of themselves and a class of persons who had purchased homes in Reston, Virginia, during the four-year period preceding the filing of the complaint, and who had been unlawfully charged title examination fees in accordance with the minimum fee schedule. Named as defendants in this action were the Virginia State Bar and the bar associations of Fairfax and Arlington counties and the City of Alexandria.

The complaint alleged that the defendants had violated the Sherman Antitrust Act, 15 U.S.C. §1, by the operation of the minimum fee schedule system, under which adherence by attorneys to the schedule promulgated by the local bar associations was compelled by the State Bar. The State Bar's compulsion was brought about by its issuance of Opinions 98 and 170, which, in effect, threatened attorneys with disciplinary proceedings if they did not follow the fee schedule. In addition, the complaint alleged that the issuing of the 1962 and 1969 State Bar Reports, which led to the promulgation of the virtually identical

local bar association minimum fee schedule, also made the State Bar a co-conspirator. Petitioners contended that, as a result of the minimum fee schedule system, the members of the plaintiff class had been overcharged for title examinations in connection with the purchase of their homes. The complaint asked for treble damages, as well as declaratory and injunctive relief against the continued operation of the minimum fee schedule system.

After discovery was conducted, a pre-trial conference was held at which it was agreed to sever the trial on liability from that on damages. On September 27, 1972, the District Court, without objection by the respondents, certified this action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure and, after extensive oral argument, denied the motions of the defendants for summary judgment.[2] Thereafter, plaintiffs entered into a settlement with the defendants Alexandria Bar Association and Arlington County Bar Association, under which those two associations agreed to withdraw their fee schedules, to advise their members of the withdrawal, and to refrain from publishing any minimum or suggested fee schedules in the future, in exchange for which all damage claims against the two associations were dismissed with prejudice.

The trial took less than half a day because the bulk of the facts had been agreed upon by stipulation of the parties. The defendants renewed their contentions previously made by motion that there was no liability on their part because (1) there was an insufficient connection between the activities of defendants and interstate commerce, (2) lawyers, as

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[2] Individual notice by plaintiffs was sent to the approximately 2400 members of the plaintiff class, and additional notice by publication in the *Reston Times* was also made.

members of a learned profession, were exempt from the Sherman Act, and (3) their actions were those of the State and hence immune under *Parker v. Brown*, 317 U.S. 341 (1943). Following the submission of proposed findings of fact, conclusions of law, and post-trial memoranda, the District Court issued its memorandum opinion and made findings of fact (App. A). It ruled that the defendant Fairfax County Bar Association had violated the antitrust laws and was liable for damages to the members of the plaintiff class, but found on *Parker v. Brown* grounds that the State Bar was not liable, a claim that it had previously denied.

The Court first found that the operation of the minimum fee schedule system was a contract, combination, and conspiracy in restraint of trade, and specifically declined to create an exemption for the pricing practices of attorneys, noting that "fee setting is the least 'learned' part of the profession" (App. A, p. 5). From the evidence which showed that the rates charged for title examinations were not in most cases based on factors other than the minimum fee schedule, and from the evidence concerning the efforts of the Goldfarbs to obtain legal services at rates below the fee schedule amounts, the Court concluded that there was significant adherence to the fee schedule (Findings 6-8, App. A, p. 8), which resulted in damage to the Goldfarbs (App. A, p. 4).

As for the commerce issue, the trial judge concluded that, with respect to real estate transactions in Northern Virginia, and particularly in Fairfax County, a significant amount of interstate commerce was affected by the use of these schedules. Based upon what the Court considered to be "a fair sampling of loans made on real estate in Fairfax County" (App. A, p. 4), it found that more than

half of the money loaned came from out-of-state sources. Plaintiffs' witness had examined one of every ten chronological deed books for the years 1970 and 1971 for Fairfax County, and this examination showed that more than $75,000,000 of the loans came from out of state just for that sample (Finding 2, App. A, p. 7). In addition, the Court relied on the fact that millions of dollars of loans guaranteed by the United States Veterans Administration and United States Department of Housing and Urban Development, both of which were headquartered in the District of Columbia, had been made in the Northern Virginia area, with particularly large amounts for Fairfax County in the years 1968-72 (App. A, p. 4; Findings 3 & 4, App. A., p. 7). The Court also noted the large percentage of persons who live in Fairfax County but who work outside Virginia (App. A, p. 4), and found that substantial numbers of persons who had lived outside of Northern Virginia in 1965 had moved into Northern Virginia by the year 1970 (Finding 1, App. A, pp. 6-7). Accordingly, the Court concluded that the requirement of "commerce among the several states" in 15 U.S.C. §1 had been met.

The final defense raised was that defendants' conduct was immune under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). With respect to the defendant Fairfax County Bar Association, the Court rejected this argument, noting both the voluntary nature of the association and the fact that the group freely adopted the minimum fee schedule (App. A, pp. 5-6). The Court stated that the "fact that the State furnishes a vehicle for its enforcement upon complaint does not extend immunity to the local bar association" (App. A, p. 5).

The Court refused, however, to hold the State Bar liable for what the Court described as "its minor role in this

matter" (App. A, p. 6). It found that the actions taken by the Bar were within the scope of its statutory or rule-created authority and hence were actions of the State and not those of private persons (*Id.*). It noted that there had never been any action taken by the State Bar to discipline an attorney for charging less than the minimum fee schedule and that, in view of the declaration of illegality of the fee schedule of the local bar association, any need for injunctive relief against the State Bar was removed (*Id.*). Thereafter, the Court entered an order, the form of which had been agreed to by the parties, enjoining the further enforcement or use of Fairfax's minimum fee schedule. That order contained an appropriate direction pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and stayed all further proceedings in the District Court until the appeals of the plaintiffs and the Fairfax County Bar Association could be decided.

C. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals, with Senior Circuit Judge Boreman writing for the majority, affirmed that part of District Court's decision granting immunity to the State Bar, but reversed the judgment entered against the Fairfax County Bar Association, holding that the activities involved were immune under a "learned profession" exception to the antitrust laws and that there was an insufficient showing of an effect upon interstate commerce to sustain jurisdiction under the Sherman Act.

Initially, the Court discussed the applicability of the state action doctrine of *Parker v. Brown* to the State Bar. It correctly identified the three *Parker* requirements of a legislative command limiting competition, the presence of

an agency of the State, and the vesting of authority for the final decision with that State agency rather than with a private person. With respect to the requirement of a "legislative command" to engage in the particular activities, the Court focused on section 54-48 of the Virginia Code, which authorizes the Virginia Supreme Court to promulgate rules and regulations defining the practice of law and prescribing a code of ethics and procedures for disciplining attorneys. The Court of Appeals observed that the "desired goal of the Code of Professional Responsibility is to benefit clients and the public in general. . ." and that it would be "manifestly unfair to dissect a state's regulatory program into its various component parts, parts that were meant to interrelate, and then to declare that because some factors may benefit those to be regulated, the program falls outside the *Parker* exemption" (App. B, p. 10). Based upon this analysis, the majority concluded that the Virginia Code "gave the Virginia Court the power to restrict competition among those in the legal profession" since it was the "Virginia legislature that created the machinery for regulation" (App. B, p. 12). The majority reached this conclusion despite the fact that there is not a word in any of the Virginia statutes which even mentions minimum fee schedules or restrictions on competition, much less which sanctions their use.

Turning to the second *Parker* condition – the presence of a state agency – the Court declined the invitation of the State Bar to rule that the Bar, which is comprised wholly of lawyers, could create antitrust immunity for itself by its approval of its own activities (App. B, p. 11). It did hold, however, that the Supreme Court of Virginia was sufficiently independent to provide the required State agency activity for purposes of *Parker v. Brown*.

As to the final requirement under *Parker*, the Court acknowledged that the Virginia Court must "*actively* supervise the State Bar" (App. B, p. 11, emphasis in original). It observed that the Virginia Court initially gave the authority to the State Bar to issue fee schedules and opinions similar to Opinions 98 and 170 concerning adherence to such schedules, and that the Court officially adopted the Code of Professional Responsibility, which in discussing the proper method of setting fees mentions the use of local fee schedules (See App. A, p. 9). It also noted that the Virginia Court has employed suggested fee schedules in establishing attorney's fees in cases before it.

However, the most important aspect of the immunity determination was the Court's reliance on its earlier decision in *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (1971). The Court there held that inaction by the state utility commission with regard to a proposal before it did not necessarily constitute a lack of active supervision required for immunity, on the theory that it is "just as sensible to infer that silence means consent, *i.e.* approval." *Id.* at 252. The majority below thereupon concluded that because the Virginia Court "has the authority to regulate and supervise the State Bar[,] we will not infer abandonment of that authority because of claimed inactivity. The active independent state supervision required in *Parker* is provided here by the Virginia Court" (App. B, p. 11).

In his dissenting opinion, Judge Craven, who was the author of the *Washington Gas Light* opinion, observed that the Virginia Supreme Court "will be surprised to learn that it is engaged in *active* supervision of the State Bar's implementation of minimum fee schedules in Virginia. I find nothing in the record to suggest that the Virginia

Court even knew that the Fairfax County Bar Association had a minimum fee schedule, or that it approved it either directly or indirectly through the State Bar" (App. B, p. 21, emphasis in original). Judge Craven, however, went on to exonerate the State Bar because of its "exceedingly 'minor role'" in this matter (App. B, p. 21). In his view, the State Bar did no more than to suggest the adoption of minimum fee schedules by local bar associations and to circulate reports on the schedules that were adopted.[3]

No member of the panel found that *Parker v. Brown* protected the Fairfax County Bar Association, and thus it was necessary to examine the other defenses since the court found it "abundantly clear . . . that the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County" (App. B, p. 13). The majority then determined that there is a limited exemption from the antitrust laws for the "learned professions," relying on two cases[4] which "hold" that one engaged in the practice of a profession does not follow a trade and that his activities are not the subject of commerce (App. B, p. 13 and notes 33 and 34). In explaining its ruling, it observed that the occupation of one who violates the Sherman Act

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[3] In discussing the involvement of the State Bar, Judge Craven made no mention of the stipulated facts that the State Bar Reports were the basis of the local fee schedules and that the existence of Opinions 98 and 170 is a "substantial influencing factor" in the adherence by Virginia lawyers to such fee schedules (Stip. ¶¶15 & 20, App. A, pp. 18-19).

[4] *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 653 (1931); and *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922). The Court also noted *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 573 (1944) (dissenting opinion of Chief Justice Stone).

is irrelevant, but that there must be a restraint upon trade or commerce (App. B, p. 15). The majority then stated that a restraint upon the interstate sale of health insurance would be unlawful,[5] but that "if a group of doctors conspire to restrain the practice of another doctor there is no Sherman Act violation because that which is restrained (*i.e.*, the practice of a learned profession, medicine) is neither trade nor commerce."[6] The Court of Appeals thereupon resolved the case before it as follows:

> With that distinction in mind, it should be clearly discernible that the impact of the Association's fee schedule in the instant case upon competition among attorneys for real estate work is not within the Sherman Act. *Id.*

The basis of this distinction was properly rejected by Judge Craven in his dissent (App. B, pp. 23-24), and its applicability to this case is difficult to support since the restraint is not on the legal profession but on the fee-setting practice of lawyers. Nonetheless, the majority observed that "where the restraint is upon the learned profession itself . . . the promulgation of a fee schedule has a sufficient part in the overall scheme devised by the State of Virginia to regulate the legal profession to claim the form of limited immunity to antitrust prosecution available under the 'learned profession' exemption" (App. B, p. 15).

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[5] Citing *American Medical Ass'n. v. United States*, 317 U.S. 519 (1943).

[6] App. B, p. 15, citing *Riggall v. Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958).

Although the holding on the "learned profession" issue would seem to have disposed of the case, the majority then proceeded to determine that petitioners also had not established a sufficient connection with interstate commerce to make the Sherman Act applicable.[7] The Court focused its attention on the allegations that the restraint occurred in connection with the financing and insuring of home mortgages by inflating a component part of the cost of securing housing. After reviewing the findings of the District Court, the majority concluded that the fact that persons involved in the purchase of these homes worked outside of Virginia is "totally irrelevant" (App. B, p. 16), even though those purchasing the services may have crossed state lines for the sole purpose of doing so. *Id*, citing *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic & Hospital v. Cleere*, 197 F.2d 125 (10th Cir. 1952); and *Kallen v. Nexus Corp.*, 353 F. Supp. 33 (N.D. Ill. 1973). It further held that the act of a borrower in securing mortgage money from an out-of-state lender makes neither the selling of the house nor the supplying of incidental legal services, interstate activity (App. B, p. 17). It went on to observe that the "fact that those services are occasionally used by persons who simultaneously engaged in an ancillary interstate transaction to facilitate the conduct of that transaction is merely 'incidental' [and] does not justify Federal regulation of competitive restraints upon a business which is 'wholly local' in character" (App. B, p. 18).

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[7] The majority opinion contains a cryptic sentence which indicates that the learned profession discussion may have been merely *dicta*: "Since that which is allegedly restrained is not a learned profession, the 'learned profession' exemption does not apply here." (App. B, p. 15).

Judge Craven, dissenting, pointed to the findings of the District Court regarding the millions of dollars of out-of-state funds loaned each year for Northern Virginia homes, the interstate guarantees by the Veterans Administration and the Department of Housing and Urban Development, the travel and movement of persons into Northern Virginia, and the large percentage of persons who live in Fairfax County who work outside of Virginia. He concluded that the Northern Virginia housing market "cannot realistically be considered a purely local market" (App. B, p. 22). Relying on this Court's opinions in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), and *United States v. Women's Sportswear Mfgs. Ass'n*, 336 U.S. 460 (1949), he concluded that the price-fixing agreement "has a sufficient impact on interstate commerce to come within the Sherman Act" (App. B, p. 22).

REASONS FOR GRANTING THE WRIT

In recent years the fee setting practices of lawyers have become an increasingly debated topic.[8] Last fall a subcommittee of the Senate Judiciary Committee held six days of hearings on legal fees,[9] two days of which were devoted to the issue of minimum fee schedules. At the time that this action was commenced, there were minimum fee schedules in use in thirty four states (Stip. ¶ 26, App. A, p. 20). Following the decision in the District

[8] See App. B, p. 19, n. 57.

[9] Hearings, Legal Fees, Before the Subcommittee on Representation of Citizens Interests of the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess. (1973) (hereinafter "Hearings on Legal Fees").

Court, a great many of these schedules were withdrawn, and some states were considering doing so.[10] It seems likely, however, that this trend will be arrested because of the decision below, and there may even be attempts to reinstate those schedules which were abandoned because of fear of litigation. Real estate settlement costs, with particular emphasis on the very practices challenged here, have also been a focus of much recent attention as many concerned citizens have begun to consider ways to reduce these expenses to a reasonable level.[11]

It is and has been for some time the position of the Department of Justice that minimum fee schedules are unlawful under the Sherman Act.[12] Finally, on the day following the decision in the Court of Appeals in this case, the Justice Department fulfilled its long-standing promise[13] and filed suit challenging the use of minimum fee schedules. *United States v. Oregon State Bar*, Civil No. 74-362 (D. Ore., filed May 9, 1974). In doing so, the Justice Department continued its pattern of contesting the legality of

[10] See Hearings on Legal Fees at 195-196; *American Bar News*, Vol. 19, No. 5, pp. 1, 3-4 (June 1974).

[11] See *e.g.*, Hearings on Legal Fees at 66-70 and Hearings, Real Estate Settlement Costs, Before the Subcommittee on Housing of the Committee on Banking and Currency, House of Representatives, 93rd Cong., 2d Sess. (1974).

[12] See Hearings on Legal Fees, Statement of Acting Assistant Attorney General Bruce Wilson, 164-174, as well as the texts of prior statements by various officials in the Antitrust Division, submitted for the record, pp. 174-185.

[13] Hearings on Legal Fees at 164-165, 184.

anticompetitive activities by professional societies. [14] However, if the decision below is allowed to stand, it will cast considerable doubt upon whether such professional groups can be subjected to Sherman Act liability because of their professional status and in many instances because of their allegedly local operations. Furthermore, since most professions are regulated by the States to some extent, and since States are now tending to establish some form of regulation over many heretofore unregulated service industries, [15] the expansive antitrust immunity afforded such groups by the opinion of the majority below will seriously narrow the reach of the Sherman Act.

Part IV of the majority opinion, entitled "Judicial Legislation," tacitly acknowledges the importance of the questions presented, but suggests that "the Goldfarbs urge us to depart from that line of cases" which establishes that minimum fee schedules are not subject to regulation under the Sherman Act (App. B, p. 19). To the contrary, it is not petitioners but respondents and the Court of Appeals which have departed from a long line of decisions of this Court and of other Courts of Appeals which have held practices substantially identical to those at issue here to be unlawful under the Sherman Act. It is these departures

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14 *United States v. National Society of Professional Engineers*, Civ. No. 2412-72 (D.D.C.); *United States v. American Institute of Certified Accountants*, Civ. No. 1091-72 (D.D.C.); and *United States v. American Society of Civil Engineering*, 72 Civ. 1776 (S.D.N.Y.).

15 Title 54 of the Virginia Code deals with the regulation of Professions and Occupations. Included among the thirty-six chapters are those regulating architects, barbers, contractors, dry cleaners, pharmacists, hearing aid dealers, pilots, real estate brokers, antique dealers and pawnbrokers (1972 Replacement Volume and 1974 Supp.).

from prior precedents, as well as the obvious importance of the questions presented, which provide a proper basis for granting the writ.

A. THE LEARNED PROFESSION EXEMPTION

The distinction which the Court of Appeals drew between this case and *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), will not withstand analysis. In the *AMA* case this Court held that doctors who conspired to obstruct the sale of health insurance by others to the public could not escape criminal liability simply because of their professional status. Moreover, this Court specifically held that the conspiracy "aimed at restraining or destroying competition" violated the Sherman Act, 317 U.S. at 529. In this case, associations of lawyers have promulgated a fee schedule restraining the pricing decisions of lawyers, thereby preventing homebuyers from obtaining reasonably priced services for title examinations. In both cases the restraints were effectuated by professionals and operated to cause economic harm to members of the public, and accordingly, they are indistinguishable for purposes of Sherman Act liability.

This basic position, that the professional status of a Sherman Act defendant is "immaterial," [16] was reaffirmed in *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952), although this Court held that no concerted refusal to deal had been proven there, and thus did not pass on whether the specific allegations constituted a violation of the antitrust laws. Finally, in *United States*

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16 *American Medical Ass'n v. United States*, 317 U.S. 519, 528 (1943).

v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950), a minimum fee schedule arrangement among licensed real estate brokers, far less restrictive than that involved here, was held to violate the Sherman Act. The sole dissenter pointed out that the result would also preclude use of fee schedules by doctors and lawyers, 339 U.S. at 496, yet the Court nonetheless held for the Government.

The majority below erred in failing to realize that petitioners were not seeking to utilize the Sherman Act to regulate the manner in which legal services are rendered. Petitioners have urged only that the antitrust laws are applicable when ". . . it is in an area of 'enterpreneurial' rather than professional activity that [defendants] are charged with having run afoul of the Sherman Act." *Northern California Pharmaceutical Ass'n v. United States*, 306 F.2d 379, 385 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962). As the District Court in this case noted in rejecting the "learned profession" defense, "[c]ertainly fee setting is the least 'learned' part of the profession" (App. A, p. 5).

Although the opinion below claimed that two decisions of this Court "hold" that there is a "learned profession" exemption,[17] a fair reading of those decisions[18] supports the view of Judge Craven that the language relied on is *dicta* and no more (App. B, p. 23). For example, this Court has recently had occasion to comment on the scope of the exemption for baseball from the antitrust laws, which is one of the bases for the decision below:

[17] App. B, p. 13.

[18] *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 653 (1931) and *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922).

> With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.

Flood v. Kuhn, 407 U.S. 258, 282 (1972).[19]

Judge Craven in his dissent was clearly correct in his observation that while ". . . the practice of law is a learned profession, it is pursued for the purpose (among others) of earning a living. To that extent it falls within the strictures of the Sherman Act, and I would affirm the decision below" (App. B, p.24). Persons who engage in activities restricting commerce among the several States are not exempt from the reach of the antitrust laws because of their professional status, and this Court should grant the petition and lay to rest the claims of those relying upon ancient *dicta* to support a contrary view.

B. THE ACTIVITIES INVOLVED HERE HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE.

In determining that petitioners had failed to show that the restraints in question had a substantial impact on interstate commerce, the majority opinion was in error in placing excessive reliance upon the local application of the restraint rather than examining the interstate aspects of

[19] Not only has the exemption not been applied to other sports such as boxing and football, but it does not even extend to amateur softball. See *Amateur Softball Ass'n v. United States*, 467 F.2d 312 (10th Cir. 1972).

these transactions as a whole to determine whether they met the requirements of the Sherman Act. Petitioners demonstrated to the District Court that there were literally hundreds of millions of dollars of loans on residential property in Northern Virginia guaranteed by the United States Veterans Administration and Federal Housing Administration, both of which were located in Washington, D.C. Furthermore, a sampling of the deed books in Fairfax County showed that more than 50 percent of the mortgage money loaned for real estate in that county for a two-year period came from out-of-state. Petitioners also established that significant numbers of individuals have moved their residences from out-of-state into Northern Virginia in recent years, and the District Court found that a substantial proportion of the persons living in the area worked outside the state. Since the price fixing for title examination services operated to limit the ability of a buyer to purchase and finance a home, it is apparent that although the restraint was applied at the local level, there was a substantial impact on the millions of dollars of interstate business that was affected by this price fixing arrangement. The Court of Appeals placed far too little emphasis upon these aspects of the transaction and hence fell into conflict with decisions of this Court and those in other circuits.

Most recently this Court in *Burke v. Ford*, 389 U.S. 320 (1967), in a unanimous *per curiam* reversal of a Tenth Circuit decision, held that a territorial division among Oklahoma liquor dealers was shown to have had a substantial effect on interstate commerce where the liquor was sent from out-of-state even though the territorial division was entirely local. In this case with 50 percent of the mortgage money in the sample chosen

coming from out-of-state, the rationale of *Burke* clearly applies, and the majority's decision is inconsistent with it. As this Court said in *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954), another decision ignored by the majority, "[t]hat wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question."

Although relied upon by petitioners and discussed in the dissenting opinion (App. B, p. 22), the majority makes no reference at all to two other important decisions of this Court which would uphold the finding of a substantial effect on interstate commerce. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), and *United States v. Women's Sportswear Mfgs. Ass'n*, 336 U.S. 460 (1949). In the latter decision, the remarks of Mr. Justice Jackson are clearly appropriate to this case: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Id.* at 464. See also *Perez v. United States*, 402 U.S. 146 (1971).

Moreover, the decision below is in conflict with the holdings and the rationale of the decisions of a number of other circuits in similar situations. Most prominent among these is that of the Third Circuit in *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (1973). The Court there held that plaintiffs' allegations relating to the interstate purchase of hospital services and supplies, the interstate movement of patients to its hospital, the interstate distribution of reimbursements by the defendants, the out-of-state residences of a substantial number of defendants' subscribers, as well as other facts comparable to those established here, were sufficient to bring the matter within the jurisdiction of the Sherman Act.

Similarly, a number of recent opinions of the Ninth Circuit, [20] the Fifth Circuit, [21] and the Seventh Circuit [22] support the position urged by petitioners and strongly endorsed by the dissent. Concededly, none of these cases is factually identical to the instant case, and ". . . precedent in this area is unlikely to dictate the outcome in any given case. Instead, it is more likely to communicate a general sense as to how much of an impact local activities must have upon interstate commerce before they confer jurisdiction." *Doctors, Inc. v. Blue Cross, supra* at 51. None of the cases relied upon by the majority below involved transactions having the effects on interstate commerce found here, and it should have held, as the dissent urged, that the market "cannot realistically be considered a purely local [one]" (App. B, p. 22).

Finally, the effect of sustaining this decision would be to prohibit the Congress from regulating these transactions under the Commerce Clause since, as the Ninth Circuit recently noted, "every Sherman-Act holding that jurisdiction does not lie is a holding that the evil alleged is beyond the power of Congress to control. Conversely, a

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20 *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517 (1972), *cert. denied*, 412 U.S. 950 (1973), *Gough v. Rossmoor Corp.*, 487 F.2d 373 (1973), and *Copp Paving Co. v. Gulf Oil Co.*, 487 F.2d 202 (1973), *cert. granted*, 94 S.Ct. 1586 (1974) (limited to commerce questions under the Robinson-Patman and Clayton Acts).

21 *Battle v. Liberty National Life Insurance Co.*, 493 F.2d 39, 47-48 (1974).

22 *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n*, 484 F.2d 751 (1973), *cert. denied*, 414 U.S. 1131 (1974).

holding that conduct is within the reach of Congress' constitutional power for some other purpose is entitled to great weight in a Sherman Act case." *Copp Paving Co. v. Gulf Oil Co., supra*, at 204. See also *United States v. Frankfort Distilleries Inc.*, 324 U.S. 293, 298 (1945) (". . . Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied . . ."). Thus, contrary to the suggestion in the majority opinion (App. B, p. 17, n. 50), the result in this case does threaten to undermine such cases as *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and even more so its companion case *Katzenbach v. McClung*, 379 U.S. 294 (1964), which was not even mentioned by the Court of Appeals. In short, there is no decision of this Court in the modern era of construction of the Commerce Clause following *Wickard v. Filburn*, 317 U.S. 111 (1942), which sustains the majority's view of the reach of the Sherman Act. Accordingly, the writ should be granted with respect to this question as well.

C. THE PARKER v. BROWN ISSUE.

It has been more than thirty years since this Court decided *Parker v. Brown*, 317 U.S. 341 (1943), and in the interim, although passing upon related issues, [23] this Court has not reviewed or amplified that important decision. In our view this is a particularly appropriate case to do so because the decision of the majority, relying heavily upon the Fourth Circuit's previous ruling in *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438

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23 *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

F.2d 248 (1971), has significantly and unjustifiably broadened the state action immunity under *Parker* to an extent uncountenanced in any other circuit. [24]

The first deviation from *Parker* is the lower court's construction of the requirement that there be a "legislative command" from the State that competition is to be replaced by regulation. 317 U.S. at 350. The majority permitted the test to be met even though no mention whatsoever was made of fee schedules in any Virginia statute, and there was not the slightest indication in any legislation that Virginia intended to eliminate competition in providing legal services, as had clearly been the case with the State of California and the raisin industry in *Parker*. Second, the majority improperly determined that silence by the Virginia Supreme Court constitutes approval of, and meaningful regulation and supervision over, private action within *Parker v. Brown*. That position is unsupported by anything in *Parker* and has been referred to by one court as an "unwarranted hyperextension of *Parker*." See *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 351 F. Supp. 1153, 1203 n. 129 (D. Haw. 1972), *appeal pending*, No. 73-1513, 9th Cir. Unlike *Parker*, there was no legislative determination to limit competition here, nor was there any requirement for public hearings, detailed findings of fact by an independent State agency, or any of the other procedural and substantive safeguards present in *Parker* which led

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[24] No petition for a writ of certiorari was filed in *Washington Gas Light*. The case was settled, however, after the Fourth Circuit decided the case for defendant on two separate grounds. See 85 Harv. L. Rev. 670, 673 n. 28 (1972).

this Court to conclude that, where meaningful alternative State regulation of the challenged practices is present, the Sherman Act was not intended to override it.

Moreover, the decision below is in conflict with other decisions of this Court in the analogous area of pre-emption of antitrust laws by federal regulatory statutes. For example, in *Silver v. New York Stock Exchange*, 373 U.S. 341, 361 (1963), this Court held that antitrust exemptions founded on a regulatory statute exist "only to the extent necessary" to protect the aims of the act in question. Furthermore, in a long line of cases culminating in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), this Court has ruled that courts should be reluctant to imply exemptions from the antitrust laws based on pre-emption by other federal regulatory statutes.[25] Not only was the majority below not reluctant to find immunity, it appears to have been positively eager to do so. This Court's unwillingness to grant antitrust immunity based on other federal regulatory statutes should have dictated even greater caution where the regulation is under the control of a State agency, responsive only to a State legislature, and not to Congress; and yet the majority clearly took the opposite position.

In addition to its marked departure from *Parker* and other decisions of this Court, the result reached by the majority is inconsistent with the holdings of a number of

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[25] *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973), is not to the contrary since that decision turned upon a finding that the CAB had in fact approved the challenged transactions in which case the immunity was specifically provided for by statute.

other circuits on this issue. For example, the District of Columbia Circuit in *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (1971), *cert. denied*, 404 U.S. 1047 (1972), and the Third Circuit in *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (1971), denied defendants immunity even though they were government officials acting pursuant to duly enacted statutes.[26] The decisions of the First Circuit in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, *cert. denied*, 400 U.S. 850 (1970), and the Sixth Circuit in *Bale v. Glasgow Tobacco Board of Trade, Inc.*, 339 F.2d 281 (1964), clearly would have been different if they had accepted the rationale that silence constitutes approval relied upon by the majority to find meaningful State regulation in this case. It also seems likely that the Ninth Circuit would not have permitted the result reached by the majority here because of its view that *Parker* is applicable only where there is strict legislative control over the program on which the exemption is based. See *Northern California Pharmaceutical Ass'n v. United States*, 306 F.2d 379, 386, *cert. denied*, 371 U.S. 862 (1962). See also *Ladue Local Lines, Inc. v. Bi-State Devel. Agency*, 433 F.2d 131 (8th Cir. 1970) (exemption found only with clear legislative mandate to engage in challenged activities). Finally, the Tenth Circuit in *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1367 (1972), has adopted the view so clearly rejected by the court here that all implied exemptions from the antitrust laws should be narrowly

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[26] Even though neither *Hecht* nor *Norman's* dealt with a statutory scheme of a State, both courts analyzed the issues in terms of *Parker v. Brown* and the cases construing it. See 444 F.2d at 936 and 444 F.2d at 1017.

construed and doubts resolved in favor of the continuing applicability of the antitrust laws.

Even more directly in point, the Fifth Circuit in *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1294 (1971), *cert. denied*, 404 U.S. 1407 (1972), stated that "not every governmental act points a path to an antitrust shelter." This view has been followed by that court in a post-*Washington Gas Light* case, *Gas Light Co. of Columbus v. Georgia Power Co.*, 440 F.2d 1135, 1140 (1971), *cert. denied*, 404 U.S. 1062 (1972), where the court specifically declined to carry the *Parker* exemption to the extent permitted in *Washington Gas Light*. Furthermore, a recent decision of the Central District of California in *United States v. Pacific Southwest Airlines*, 358 F. Supp. 1224, 1227 (1973), required that *Parker-Brown* be limited "*to combinations of which a state was the moving force . . .*" and to situations where the legislative action was "*directed, commanded* or *imposed*" (emphasis in original). That opinion interpreted *Washington Gas Light* to apply only when the State agency directed and not merely authorized the action being challenged, a reading which is directly at variance with the majority's opinion here.

Thus, it is clear that the Fourth Circuit's position on the scope and requirements of the state action exemption delineated by *Parker v. Brown* is aberrational. Accordingly, the petition should be granted in order to bring the law on this issue in the Fourth Circuit in line with *Parker v. Brown* itself and with the construction given it in the other circuits.[27]

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[27] This Court will hear argument this term in a case involving the interpretation of state action under the Civil Rights Act in

(continued)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted with respect to each of the three questions on which it is sought.

Respectfully submitted,

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August 5, 1974

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[27] (continued) *Jackson v. Metropolitan Edison Co.*, 483 F.2d 754 (3rd Cir. 1973), *cert. granted*, 94 S.Ct. 1407 (1974). In that case a utility which cut off service to non-paying customers without affording them a hearing, pursuant to regulations duly filed but not acted upon by the utility commission, argued that there is insufficient state action involved to bring it within the Fourteenth Amendment's due process limitations. The anomaly of the claim of state action exemption in the antitrust laws based on silence, while at the same time maintaining that no state action is involved where regulations are filed but not acted upon by the public utility commission, has not gone unnoticed. See *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638, 662 (7th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1114 (1973).

APPENDIX A

Lewis H. GOLDFARB and Ruth S. Goldfarb, Plaintiffs,
v.
VIRGINIA STATE BAR and Fairfax County Bar Association, Defendants.
Civ. A. No. 75-72-A.

United States District Court,
E. D. Virginia,
Alexandria Division.
Jan. 5, 1973.

Class action under Sherman Act against County Bar Association and State Bar for injunctive relief and damages. The District Court, Albert V. Bryan, Jr., J., held that minimum fee schedule adopted by County Bar Association, consistent violations of which could subject an attorney to disciplinary measures initiated by committees of State Bar, was illegal under Sherman Act. The court further held that in its minor role with respect to such schedule, State Bar was engaged in state action and was not liable under Sherman Act, where there was no claim that any actions taken by state Supreme Court, State Bar, or council of State Bar were not within scope of their statutory or rule-created authority, and where there had never been any action taken by State Bar to discipline any attorney for consistently charging less than fee suggested in a minimum fee schedule, and no such action was contemplated.

Order accordingly.

1. Monopolies ⇐12(17)
Minimum fee schedules are a form of price-fixing and therefore inconsistent with antitrust statute prohibiting anticompetitive activities. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

2. Monopolies ⇐12(17)
A defendant's liability under Sherman Act depends not on actual adherence to proposed fee schedule but rather on mere existence of an agreement which restricts competition by price-fixing. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

3. Monopolies ⇐12(17)
Minimum fee schedule adopted by county bar association, consistent violations of which could subject an attorney to disciplinary measures initiated by committees of State Bar, amounts to a price-fixing agreement for purposes of antitrust statutes. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

4. Monopolies ⇐12(17)
Minimum fee schedule adopted by Fairfax County, Virginia, bar association sufficiently affected interstate commerce to sustain jurisdiction under Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

5. Monopolies ⇐12(17)
Professional legal services are a "trade" within Sherman Act declaring illegal a combination or conspiracy in restraint of trade. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

6. Monopolies ⇐12(17)
Minimum fee schedule adopted by county bar association, consistent violations of which could subject an attorney to disciplinary measures initiated by committees of State Bar, did not constitute lawfully regulated state action not subject to provisions of Sherman Act, where such schedule was a private undertaking and did not derive its authority or its efficacy from legislative command of state and would have been operative and effective without any command from legislature or Supreme Court, notwithstanding fact that state furnished a vehicle for its enforcement upon complaint. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Monopolies ⇨12(1)

State cannot give immunity to those who violate Sherman Act by authorizing them to violate it or by declaring their action lawful. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

8. Monopolies ⇨12(17)

Minimum fee schedule adopted by county bar association, consistent violations of which could subject an attorney to disciplinary measures initiated by committees of State Bar, was illegal under Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

9. Monopolies ⇨12(1)

In its minor role with respect to illegal minimum fee schedule adopted by county bar association, State Bar was engaged in state action and was not liable under Sherman Act, where there was no claim that any actions taken by state Supreme Court, State Bar, or council of State Bar were not within scope of their statutory or rule-created authority, and where there had never been any action taken by State Bar to discipline any attorney for consistently charging less than fee suggested in minimum fee schedule, and no such action was contemplated. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

10. Monopolies ⇨12(1)

Rule that Sherman Act restrains only actions of private persons and not state action applies equally to both a state's judicial actions and its legislative actions. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

11. Monopolies ⇨28(1.7)

State Bar, as an administrative agency of the Supreme Court, was not intended to be included among those liable for damages under Clayton Act. Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

Alan B. Morrison, Washington, D. C., for plaintiffs.

Stuart H. Dunn, Asst. Atty. Gen., Richmond, Va., for defendant Virginia State Bar.

T. S. Ellis, III, John H. Shenefield, Lewis T. Booker, Hunton, Williams, Gay, Powell & Gibson, Richmond, Va., for defendant Fairfax Bar Ass'n.

MEMORANDUM OPINION

ALBERT V. BRYAN, Jr., District Judge.

This is a class action brought under the Sherman Act, 15 U.S.C. § 1, for injunctive relief and damages as allowed by 15 U.S.C. §§ 15, 26. The agreement allegedly restraining trade or commerce is a minimum fee schedule adopted by the defendant Fairfax Bar Association, consistent violations of which may subject an attorney to disciplinary measures initiated by committees of the defendant Virginia State Bar.[1]

The matter came on for hearing, on the issue of liability only, on December 13, 1972.

The Court adopts as part of its findings of fact the Stipulation of Facts entered into by the parties and filed on December 11, 1972,[2] the Proposed Findings of Fact submitted by the plaintiff numbered 1, 2, 3, 4, 5, 6, 7 and 8, the Proposed Findings of Fact submitted by the defendant Virginia State Bar numbered 1 and 2, and Proposed Findings of Fact submitted by the defendant Fairfax Bar Association numbered 6, 9, 10, 11, 12, 13, 18, 20, 21, 24, 25, 28, 29, 33, 34, 35, 36, 37, 38,[3] 49 and 54,[4] copies of which are attached hereto.

1. The Fairfax Bar Association and the Virginia State Bar are the remaining defendants in the case. Two other defendants, the Alexandria Bar Association and the Arlington County Bar Association have agreed to a consent judgment, by virtue of which they are directed to cancel their existing minimum fee schedules and enjoined from adopting, publishing or distributing any future schedules of minimum or suggested fees.

2. Stipulation No. 16 is actually a conclusion of law rather than a fact, and the Court does not adopt it or feel it necessary to the decision in this case.

[1] Minimum fee schedules are a form of price fixing and therefore inconsistent with antitrust statutes prohibiting anti-competitve activities.

Price fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve. United States v. Real Estate Boards, 339 U.S. 485, 489, 70 S.Ct. 711, 714, 94 L.Ed. 1007 (1950).

The scope of the statutory language in the Sherman Act is so expansive that courts have been reluctant to find exceptions. The language explicitly states that "*every* contract, combination or conspiracy which restrains commerce among several states is unlawful." (Emphasis supplied.) Illustrative of this reluctance is the refusal to extend baseball's exempt status to other professional sports. See Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); United States v. International Boxing Club, 348 U.S. 236, 75 S.Ct. 259, 99 L.Ed. 290 (1955). The fact that specific exemptions are clearly delineated suggests that ambiguities should be resolved in favor of inclusion. This is especially true where price-fixing is involved since it has been declared both pernicious and lacking in any redeeming social value. Northern Pacific Ry. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1957); United States v. National Ass'n. of Real Estate Boards, *supra*; see also United States v. Trenton Potteries Company, 273 U.S. 392, 397, 47 S.Ct. 377, 71 L.Ed. 700 (1927):

> [T]he aim and result of every price-fixing agreement, if effective is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of to-morrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints.
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> . . .

[2] The minimum fee schedule actually proposes a floor upon which professional fees should be set. This type of price-fixing has been held under other circumstances to be repugnant to the philosophy of the Sherman Act. Plymouth Dealers Ass'n. v. United States, 279 F.2d 128 (9th Cir. 1960). It is contrary to the spirit of competition which sustains a free enterprise system in that it prevents competitors from using their own judgment in determining the value of their own services. Kiefer-Stewart Co. v. Seagram and Sons, 340 U.S. 211, 213, 71 S.Ct. 259, 95 L.Ed. 219 (1951). Although attorneys can violate the proposed fee schedule (at the risk, of course, of being subjected to a charge of unethical conduct) a defendant's liability under the Sherman Act depends not on actual adherence to the schedule but rather on the mere existence of an

3. Although the title insurance companies have a right to look to the individual attorney who examined the title for indemnification, the evidence is that there is no known case where such indemnification was ever actually sought. Of course, the specific fee complained of here by the plaintiffs, which is the title examination fee of 1% of the first $50,000 of purchase price plus ½% of all over $50,000, is *in addition* to the title insurance premium.

4. Since the hearing on December 13 was devoted solely to the issue of liability, it was understood in advance that no testimony with regard to the amount of any damages would be presented.

agreement which restricts competition by price-fixing. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); Plymouth Dealers Ass'n. v. United States, *supra*.

There is no distinction between the benefits ascribed to the minimum fee schedule by its advocates and those existing in a minimum sales price if, for example, the latter were to be adopted by General Motors and Ford Motor Company as to suggested sales prices for comparable automobiles. In each instance, a new dealer and a new lawyer, both unfamiliar with the customary charges in the field, would find such a minimum fee or sales price schedule helpful in setting charges. In each instance an adequate fee or price would insure a margin of profit adequate to assure further research and development or continued legal education. In each instance the public would be assured, by an examination of such schedule, that what was being charged was in line with what was generally charged in the field. Yet in none of these instances would a member of the public have any better idea that the fee or price was reasonable after he had seen the schedule than he did before. The minimum fee schedule for real estate settlements, based as it is on a percentage of the purchase price, is particularly hard to justify as having any relation to the labor involved. This is particularly so in view of the fact that the "responsibility" involved is assured by a separate charge for title insurance. The attorney's ultimate "responsibility" is illusory. *See* Footnote 3, *supra*. Such an across-the-board rate, coupled with the testimony of both Goldfarb as to his efforts to obtain legal services, and Attorney F. Shield McCandlish that a flat fee results in some overcharges which make up for undercharges, is sufficient for the Court to infer, which it does, that some damage resulted to the plaintiff.

[3] Having concluded that it is a price fixing agreement, there remain the questions whether the activity constitutes or substantially affects interstate commerce, whether professional legal services are a trade within the meaning of the Sherman Act, and whether the activities involved constitute lawfully regulated state action not subject to the provisions of the Sherman Act under Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). All of these questions are raised as defenses by both remaining defendants. They will be considered in the order mentioned.

[4] The facts found by the Court reveal (from what the Court considers a fair sampling of loans made on real estate in Fairfax County, Virginia, and the area generally serviced by the defendant Fairfax Bar Association, in which is located the subdivision of Reston whose residents make up the plaintiff class) that a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia. All or nearly all of the lenders making such loans require, as a condition of making the loan, that the title to the property involved be examined and that title insurance be furnished and paid for by the home buyer-mortgagor. This alone warrants the conclusion that interstate commerce is sufficiently affected to sustain jurisdiction under the Sherman Act. There is also uncontradicted evidence that a large percentage of persons who live in Fairfax County work outside of Virginia and that significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia. The fees charged for the title examination and insurance just mentioned are covered by the minimum fee schedule here in question. Accordingly, the Court concludes that the requirement of "commerce among the several states" of 15 U.S.C. § 1 is met.

[5] Whether lawyers are exempt from the Sherman Act because they perform personal services as a learned profession has never been squarely met by the Supreme Court. Although the Supreme Court declined to intimate the correctness of applying the term "trade"

to professions, it has declared the services of real estate brokers to be a commercial activity carried on for profit regardless of the fact that each is in business on his own. United States v. National Ass'n. of Real Estate Boards, *supra*, 339 U.S., at 490, 492, 70 S.Ct. 711.

> The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of "trade" within the meaning of § 3 of the [Clayton] Act. Id. at 490, 70 S.Ct. at 715.

Hence, despite dicta by that court, this Court is unwilling to rest its decision on such an exemption. The Court has some question whether the adoption of a minimum fee schedule is itself "professional." It seems to the Court that there is a basic inconsistency between the lofty position that professional services, not commodities, are here involved and the position that a minimum fee schedule is proper. The former properly contemplates differences in abilities, worth and energies expended of those rendering the services. Such differences are made as meaningless by a minimum fee schedule as they would be by a maximum fee schedule. Although there is as yet no evidence of this here, the minimum fee schedule does permit the charging, by an attorney, of more than the services are worth. Certainly fee setting is the least "learned" part of the profession.

The third question is the most difficult in the Court's view. In this regard it is important to point out just what is done by the various entities involved.

Va.Code Ann. § 54-59 (1972 Repl.Vol.) authorizes the Supreme Court of Virginia to "prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing."

[6-8] Pursuant to this authority the Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operation of the Virginia State Bar as found in Sections II and IV, Part 6, Rules of the Supreme Court, 205 Va. 1011, as amended January 1, 1971, and 210 Va. 411 (1/19/70). As stipulated (Stipulations 10 and 11) the powers of the Virginia State Bar have been delegated to the Council of the Virginia State Bar, the Virginia State Bar is required by statute and rule to investigate alleged violations of the standards of conduct mandate by the Virginia Supreme Court, and the Virginia State Bar has been given authority to issue opinions on matters involving questions of ethics. It is stipulated that the Supreme Court of Virginia has stated that suggested fee schedules involved such questions of ethics (Stipulations 17 and 18). Pursuant to its acknowledged authority the State Bar has issued Opinions 98 and 170 (Plaintiff's Exhibits 30 and 31) which in effect say that it is unethical habitually to charge fees below those suggested in a minimum fee schedule. The Fairfax Bar Association has adopted a minimum fee schedule although it was under no compulsion to do so. The minimum fee schedule of the Fairfax Bar Association is a private undertaking and did not derive its authority or its efficacy from the legislative command of the State and would have become operative and effective without any command from the legislature or the Supreme Court. Parker v. Brown, *supra*. The fact that the State furnishes a vehicle for its enforcement upon complaint does not extend immunity to the local bar association. Indeed, the State cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring their action is lawful." Parker v. Brown, *supra*, 317 U.S., at 351, 63 S.Ct., at 314. The State here has not specifically retained the ultimate power to control private action, and the private persons who make up

the Fairfax Bar Association are allowed unbridled freedom to select their own course of conduct. Allstate Insurance Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966), cert. denied 385 U.S. 930, 87 S.Ct. 290, 17 L.Ed.2d 212 (1966); Asheville Tobacco Board of Trade v. F.T.C., 263 F.2d 502 (4th Cir. 1959). Since the Fairfax Bar Association has selected its own course of conduct, the antitrust laws remain in full force and effect as to it. Its minimum fee schedule is declared to be illegal under 15 U.S.C. § 1, enjoinable under 15 U.S.C. § 26, and the case against it shall be set down for trial for the ascertainment of any damages provable under 15 U.S.C. § 15.

[9, 10] In its minor role in this matter, the Virginia State Bar was engaged in state action. There is no assertion that any actions taken by the Supreme Court of Virginia, the Virginia State Bar, or the Council of the Virginia State Bar were not within the scope of their statutory or rule—created authority.[4] The rationale behind the holding of Parker v. Brown, *supra*, that the Sherman Act restrains only actions of private persons and not state action, applies equally to both a state's judicial actions and its legislative actions. Whatever force or efficacy the Virginia State Bar had in rendering opinions and supplying the enforcement machinery for violations of ethical conduct it derived from the judicial and "legislative command of the State and was not intended to operate or become effective without that command."

The claim against the Virginia State Bar is even less persuasive when the specific relief sought is examined. Insofar as injunctive relief under 15 U.S.C. § 26 is concerned, that is only allowable when there is a threatened loss or damage by a violation of the antitrust laws. Here the uncontradicted evidence is that there has never been any action taken by the Virginia State Bar to discipline any attorney for consistently charging less than the fee suggested in a minimum fee schedule. Nor is any such action contemplated. Moreover the decision by the Court as to the illegality of the fee schedule insofar as the Fairfax County Bar Association is concerned removes the only ground upon which discipline could be sought.

[11] Insofar as damages are concerned, it is stipulated that the Virginia State Bar is an administrative agency of the Supreme Court of Virginia. Aside from any Eleventh Amendment considerations, such an agency was surely never intended to be included among those liable for damages under 15 U.S.C. § 15.

Counsel for plaintiff should prepare an order incorporating this memorandum by reference; declaring illegal and directing cancellation of the minimum fee schedule of the Fairfax Bar Association; enjoining that association from adopting, publishing, or distributing any future schedules of minimum or suggested fees; dismissing the action as to the Virginia State Bar; and continuing the case until January 26th 1973, for a determination of the method to be used in ascertaining what, if any, damages have been sustained by members of the plaintiff-class. The order should be presented for entry after submission to other counsel for approval as to form.

PROPOSED FINDINGS OF FACT BY THE PLAINTIFF ADOPTED BY THE COURT

1. According to the United States Bureau of the Census (Exhibit 33, pp. 400, 402, and 408), of the 162,396 persons five years of age or older who resided in Arlington County, Virginia in 1970, 50,590 (31.15%) resided outside of

4. It is arguable that 15 U.S.C. § 1 is a "statute" within the meaning of Va.Code Ann. § 54-51 (1972 Repl.Vol.) which precludes the Supreme Court of Virginia from adopting a code of ethics inconsistent with any statute. If the Supreme Court of Virginia adopted a minimum fee schedule, if it does not have inherent power to do so without regard to § 54-48, if a minimum fee schedule has anything to do with ethics (which this Court questions), and if, indeed, an entity can violate a statute which has been declared inapplicable to it, this might have to be met. In any event, the argument is not asserted by any party.

Virginia in 1965; of the 414,521 persons five years of age or older who lived in Fairfax County, Virginia in 1970, 129,955 (31.35%) lived outside of Virginia in 1965; of the 101,178 persons five years of age or older who resided in the City of Alexandria in 1970, 30,972 (30.61%) lived outside of Virginia in 1965.

2. An examination of deeds of trust in one of every ten chronological deed books for the years 1970 and 1971 in the office of the Recorder of Deeds of Fairfax County yielded the following information concerning the amounts of mortgages and the location or place of incorporation of beneficiaries (mortgagees):

Beneficiary located or incorporated outside Virginia	$ 75,615,096.21
Beneficiary located or incorporated inside Virginia	47,818,321.92
Beneficiary location or place of incorporation undetermined	12,847,702.84
total:	$136,281,120.97

When all deeds of trust in the amount of $100,000 or more were subtracted from the above totals, the following Adjusted Totals were obtained:

Out of State	In State	Location Undetermined	Totals (Adjusted)
$75,615,096.21	$47,818,321.92	$12,847,702.84	$136,281,120.97
(41,669,307.55)	(13,101,921.88)	(4,491,230.40)	(59,262,459.83)
$33,945,788.66	$34,716,400.04	$ 8,356,472.44	$ 77,018,661.14
(Totals Adjusted)			

3. The United States Veterans Administration, which is headquartered in the District of Columbia, guarantees loans to certain veterans under the provisions of 38 U.S.C. § 1810 for, *inter alia*, the purchase or construction of homes. The Veterans Administration guaranteed the following numbers and amounts of home loans in Northern Virginia during the fiscal years indicated:

Fiscal Year		Fairfax County	Arlington County	City of Alexandria	Totals
1968	No.	785	124	214	1,123
	Amt.	$ 20,891,705	$ 3,023,200	$ 5,144,700	$ 29,059,605
1969	No.	1,921	343	661	2,925
	Amt.	$ 55,516,775	$ 8,638,475	$17,677,650	$ 81,832,900
1970	No.	1,737	258	553	2,548
	Amt.	$ 54,663,294	$ 7,205,890	$15,631,215	$ 77,500,399
1971	No.	1,460	306	699	2,465
	Amt.	$ 49,602,652	$ 9,015,100	$22,463,425	$ 81,081,177
1972	No.	2,854	349	585	3,788
	Amt.	$105,056,807	$11,277,135	$18,935,915	$135,269,857

4. The United States Department of Housing and Urban Development, which is headquartered in the District of Columbia, insures certain home mortgages pursuant to 12 U.S.C. § 1706c et seq. The number and amount of such loans in Northern Virginia during designated fiscal years is as follows:

Fiscal Year		Fairfax County	Arlington County	City of Alexandria
1968	No.	1,377	229	150
	Amt.	$33,162,200	$4,636,200	$2,685,900
1969	No.	1,196	197	128
	Amt.	$29,041,550	$4,053,200	$2,273,650
1970	No.	927	158	134
	Amt.	$23,600,450	$3,373,350	$2,484,000
1971	No.	910	188	146
	Amt.	$25,187,250	$4,603,090	$3,089,250
1972	No.	832	148	152
	Amt.	$23,326,800	$3,729,050	$3,255,000

5. The Goldfarbs were charged a fee for the examination of the title to their home by A. Burke Hertz which was calculated in accordance with the effective Minimum Fee Schedule published by the Local Bar Associations (Exhibit 29).

6. Among attorneys who perform title examination services in connection with the purchases of homes in Northern Virginia, there is a significant degree of adherence to the Minimum Fee Schedule (Exhibit 29) in the determination of fees.

7. The Goldfarbs were not reasonably able to obtain legal services in examining the title to their home for a rate less than that set forth in the Minimum Fee Schedule of the Local Bar Associations (Exhibit 29).

8. A significant reason for the inability of the Goldfarbs to obtain legal services for the examination of the title to their home for less than the fee set forth in the Minimum Fee Schedule (Exhibit 29) was the operation of the minimum fee schedule system.

PROPOSED FINDINGS OF FACT BY THE DEFENDANT VIRGINIA STATE BAR ASSOCIATION ADOPTED BY THE COURT

1. No complaint has been received by the Virginia State Bar from any person or organization in any area of the Commonwealth with respect to the failure of a member of the Virginia State Bar to adhere to a minimum fee schedule.

2. There are no persons or agents employed by the Virginia State Bar to investigate matters of unethical conduct except and until receipt of an official complaint.

PROPOSED FINDINGS OF FACT BY THE DEFENDANT FAIRFAX BAR ASSOCIATION ADOPTED BY THE COURT

(6) The Canons of Ethics and the Code of Professional Responsibility promulgated by the Supreme Court of Virginia contemplate and approve suggested or advisory fee schedules. (See Canon 12 and Rules for Integration of the Virginia State Bar, Part 6 II EC 2-18, DR2-106.)

(9) Under the Canons of Ethics and the Code of Professional Responsibility, as promulgated by the Supreme Court of Virginia and the American Bar Association, it is unethical conduct for an attorney either to fix legal fees based solely on the recommended fees contained in an advisory minimum fee schedule without regard to other relevant factors, or, for the purpose of soliciting business, consistently to charge fees below the recommended fees. Neither the Virginia State Bar nor any of its district committees has ever received any complaint regarding either type of unethical conduct. Neither has the Virginia State Bar nor any of its district committees ever initiated or participated in any administrative or judicial action against an attorney for having engaged in either type of unethical conduct described above. (Trial Testimony) (See American Bar Association Formal Opinion 20, dated May 5, 1930; American Bar Association Formal Opinion 171, dated July 23, 1937; American Bar Association Formal Opinion 323, dated August 9, 1970.)

(10) The Virginia State Bar is authorized by the Supreme Court of Virginia to render advisory opinions on any question of contemplated professional conduct. Pursuant to this authority, the Virginia State Bar issued Opinions 98 and 170 which affirm the propriety of advisory or suggested fee schedules. (See Stipulation of Facts and Opinions 98 and 170.)

(11) In 1969 and on previous occasions, the Virginia State Bar has published Minimum Fee Schedule Reports setting forth and analyzing the existing fee schedules promulgated by various local bar associations in Virginia. (Trial Testimony)

(12) The following statement appeared on page 3 of the Minimum Fee Schedule Report published in 1969 by the Virginia State Bar:

> "The recommended minimum fee figures in the committee's report represent the consensus recommendation of members of the committee as to fees which should be assessed in 1969 for the legal services indicated."

Further, on page 11 of the Minimum Fee Schedule Report published by the Virginia State Bar in 1969, it is recommended that the fee for title examination be one percent of the first $50,000 of the loan amount or purchase price and one half of one percent of the loan amount or purchase price from $50,000 to $250,000. These provisions are essentially identical to the advisory information contained in the Minimum Fee Schedule promulgated by the Fairfax Bar Association.

(13) The Canons of Ethics and the Code of Professional Responsibility promulgated by the Supreme Court of Virginia state that, in determining charges for title examination and certification, it is proper to consider a minimum fee schedule or the fee customarily charged in the community for such services.

Canon 12

"In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

"In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment whil employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

"In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

"In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

Code of Professional Responsibility
EC 2-18

"The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee

for services rendered a brother lawyer or a member of his immediate family."

DR 2-106

(A) A lawyer shall not enter an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(18) Numerous attorneys who are members of the Fairfax Bar Association have charged fees for title examination different from those suggested in the Minimum Fee Schedule. (Trial Testimony)

(20) Defendant Fairfax Bar Association has never investigated, communicated with or imposed sanctions upon any member or any other licensed attorney for failing to adhere to any minimum fee schedule. Further, defendant Fairfax Bar Association has never induced or attempted to induce any other person or organization to investigate, communicate with or impose sanctions upon any member of Fairfax Bar Association or any other licensed attorney for failure to adhere to any minimum fee schedule. (Trial Testimony)

(21) Attorneys who have handled many of the real estate closings in Reston, Virginia have not rigidly adhered to the Minimum Fee Schedule promulgated by the Fairfax Bar Association. (Trial Testimony)

(24) Mr. and Mrs. Goldfarb were residing within the Commonwealth of Virginia at the time they contracted to purchase their home in Reston, Virginia. (Trial Testimony)

(25) Both the builder who constructed the home in Reston, Virginia purchased by Mr. and Mrs. Goldfarb and the real estate agent through whom they purchased are and were located in Reston, Virginia. (Trial Testimony)

(28) All of the acts performed by A. Burke Hertz in connection with the examination and certification of the title of the land in Reston, Virginia purchased by Mr. and Mrs. Goldfarb were performed within the Commonwealth of Virginia. (Trial Testimony)

(29) All transactions relating to the purchase by Mr. and Mrs. Goldfarb of their home in Reston, Virginia, including the negotiation for sale, contract of sale, title examination, securing of mortgage loan, settlement and all legal services, occurred within the Commonwealth of Virginia. (Trial Testimony)

(33) The purpose of a title examination and certification is to assure the purchaser of real estate that the land he is purchasing will not be subject to future claims as a result of past actions by prior owners. A title examination and certification assures the purchaser of real estate the free and unencumbered use and enjoyment of his land. (Trial Testimony)

(34) The duties and responsibilities of an attorney in connection with a residential real estate transfer in Reston, Virginia include the following:

(a) Initial telephone conversations and correspondence concerning general procedures and costs.

(b) Reading contract and any correspondence associated with it.

(c) Opening file and cross indexing under seller, purchaser, lender and property.

(d) Checking on past surveyor for possible recertification.

(e) Ordering house location survey.

(f) Checking on possible reissue rates on existing title insurance policies.

(g) Examination of title (more fully described in Findings Nos. 35 and 37 *infra*.).

(h) Writing for pay-off figures and determining existing trust holders.

(i) Preparation of application for title insurance binder.

(j) Transmitting application to title insurance company.

(k) Forwarding title binder to lender.

(l) Miscellaneous telephone calls relating to fire insurance, title insurance, closing costs, payment of taxes, getting termite certification, closing procedures and order, etc.

(m) Coordination of settlement date and time with lender, agent, seller, purchaser, other attorneys.

(n) Quoting verbal closing costs to seller, purchaser, agent and lender.

(o) Preparation of settlement documents--deed, note, deed of trust, settlement statements, transmittal letters.

(p) Computing settlement statements.

(q) Fulfilling all conditions of sales contract.

(r) Completing truth in lending form and other forms required by lender.

(s) Preparation of disbursement statement.

(t) Attorney review title and file for settlement. (More fully described in Findings Nos. 35 and 37 *infra*.)

(u) Submitting documents to lender, purchaser, or another attorney for review prior to settlement.

(v) Conducting settlement(s).

(w) Sending all required papers to lender.

(x) Depositing funds.

(y) Preparation of documents for recording, including notarizing, blue-backing, initialing. (More fully described in Findings Nos. 35 and 37 *infra*.)

(z) Bring-down title. (More fully described in Findings Nos. 35 and 37 *infra*.)

(aa) Recording papers.

(bb) Writing disbursement checks.

(cc) Forwarding disbursement checks.

(dd) Preparation of Deeds of Release.

(ee) Preparation of notes for marginal release.

(ff) Releasing notes on margin of land records.

(gg) Sending Deeds of Release to Trustees.

(hh) Recording Releases.

(ii) Conforming file copies of settlement documents with recording information.

(jj) Preparation of final title insurance policy application.

(kk) Preparation of Certificates of Title.

(ll) Forwarding final title insurance applications, then policies, all recorded documents to proper parties.

(mm) Final review of file for closing.

(nn) Closing and filing of file.

(35) In the course of examining and certifying a title to real estate, an attorney in Virginia must perform at least the following steps:

(A) A search of the grantor and grantee indices for at least a sixty year period. Each index covers approximate-

ly a ten year period. Therefore, to perform a sixty year search, six to eight indices must be thoroughly examined. In Fairfax County, a search of the "land book" is also required in order to ascertain the assessed value to the landowner as of January 1.

(B) After a chain of owners is established from a search of the grantor and grantee indices for sixty years, a complete check must be made for each of these owners (known as "abstracting the title chain") on all deeds, deeds of trust, deeds of release, homestead deeds, mortgages, powers of attorney, leases, notices of *lis pendens*, mechanics' liens, chancery suits to enforce mechanics' liens, etc. All of these items might be recorded in several deed books or in a single deed book, depending upon the jurisdiction. In Fairfax County, there are separate deed books for the aforementioned items.

In making a complete check of all the owners in the chain of title, care must be taken to note for each owner the type of deed, its date, the date of recording, the consideration involved, the complete description of the land, the easements, rights of way, restrictive covenance and other impediments to the free and unencumbered use of the land and whether legal requirements for signature and notarization were met in all cases. Any suggestion of a possible interference with the free and unencumbered use of the land by the new purchaser must be noted on the abstract and evaluated by the attorney.

If the parcel of land in question derives from a larger tract of land, a plat of the original land with all its divisions must be drawn or obtained by the attorney. This task may involve converting a "metes and bounds" description usually written in terms of robs, chains, degrees, perches, acres or other measurements, into feet or to a subdivision reference of lot, block and section.

In the event that a former owner in the chain of title was one who transferred a great deal of property, each deed from that owner must be located and read to determine whether the specific property involved in the current sale was, in fact, included in an earlier deed. Where similar names occur or names have been changed, as when women marry, this might well involve reading a very large number of deeds.

(C) Often, estates and inheritances of the property appear in the chain of title. In this event, the Will Index and docket records must be checked to determine whether any flaws existed in property transfers of this sort.

(D) In all cases it is necessary to check the Judgment Lien Indices in order to discover whether any judgments are outstanding against the property. In Fairfax County, there are four sets of indices of judgments to be searched. The indexed judgments must then be checked against the judgment lien docket to determine whether the judgments indexed have been satisfied. For Reston, that must be done daily for numerous subsidiary corporations of Gulf Reston, Inc., all of which hold title to property in Reston.

(E) In Fairfax it is also necessary to check the index of financing statements on household fixtures in order to determine whether unsatisfied financing statements exist. In Fairfax County, this entails checking two sets of indices.

(F) In the event subdivision plans are involved, plat or map books must be consulted for subdivision plans not recorded in deed books. Plat books should also be checked for easements and building restrictions on the property.

(G) Oftentimes, corporate owners appear in the chain of title. In this event, questions of corporate law may arise. For example, if the sale of land included all or substantially all of the assets of the corporation which were not sold in the regular course of business, then stockholders' consent to the sale must be located and verified. In addition, in some cases, verification of the name of the officers who executed a corporate deed must be obtained from the State Corporation Commission and a check

should also be made to determine whether the corporate grantor is still in existence.

(H) In all cases, federal, state, county and town or city tax records must be checked to establish whether any unpaid taxes exist as a possible lien against the property. There are several sources for this information. First, a check must be made with the Treasurer or Commissioner of Revenue to obtain information on local real estate taxes. Attorneys must be particularly careful in this area as real estate taxes in Fairfax County are payable twice a year and reassessments are frequent.

In the event that a former owner in the chain of title is an estate, the executor of an estate should personally give an affidavit to the effect that all federal estate and gift taxes and Virginia inheritance taxes are paid or nonassessable.

(I) The possible bankruptcy of any former owner in the chain of title should be checked. This information may be found in the grantor index under the name of the bankrupt former owner. However, this information need not be recorded there and it is also necessary to check the Federal District Court records.

(J) In addition to all of the foregoing, it is sometimes necessary to check additional records such as alimony and child support decrees, special commissioner deeds, and judicial sale records.

Once all of the foregoing steps are completed, an attorney must review his findings and evaluate all possible defects noted in the chain of title. (Trial Testimony.)

(36) While a title examination in Reston generally involves the steps outlined in Finding No. 35, factors peculiar to the Reston property further complicate the procedure. These factors include:

(a) Complex financing and transfer arrangements involved in the original transaction creating Reston, including a conveyance with a leaseback and both an option and an obligation to repurchase.

(b) The existence of numerous corporate subsidiaries of Gulf Reston, Inc. set up, in part, for the purpose of holding title to various parcels in Reston.

(c) The very large number of real estate transactions occurring in Reston on a daily and weekly basis.

(Trial Testimony.)

(37) Because of the peculiar nature of Reston, the following specific steps are often followed on a daily basis in connection with the examination and certification of a title to property in Reston.

(a) The grantor and grantee indices must be checked daily and all entries added to the grantor and grantee conveyance list for Gulf Reston, Inc., John Hancock Mutual Life Insurance Company, Belwood, Inc., Bonres, Inc., Bonner Reston Associates, Pignolia, Inc., the Ryland Group, Inc. and Teeshot, Inc., and this must also be done for several other corporations at less frequent intervals. This same procedure must also be followed for all unindexed instruments.

(b) After obtaining deed book and page references, the recorded instrument is examined and either abstracted or conformed or copies made. If these are extremely lengthy orders, copies are obtained from the Clerk's office at the cost of $1.00 per page.

(c) When rights of way and easements, etc. are recorded referring to the original 6,000 plus acres comprising Reston, it is necessary to determine which of the original acreage parcels is affected. Then it is necessary to determine whether the property is presently subdivided and dedicated as a section including the many resubdivisions. This will provide an up to date record of which easements and rights of way affect any area or property in Reston.

(d) Instruments such as Gulf repurchase deeds and plats, subdivisions, ease-

ment agreements, etc. are reviewed for recording. Also a comparison is made of the metes and bounds description with courses and distances on the plat to ascertain that there are no discrepancies between the two.

(e) Unrecorded instruments furnished by Gulf Reston, Inc., Vepco, C & P Telephone, Reston Transmission, etc. are checked as to each parcel or lot being examined.

(f) Each subdivision section is broken down into blocks and block lists (as to lot) and checked against grantor list to see that the duplicate lot numbers are not recorded. If errors are found, attorney who recorded the erroneous description is notified and asked to correct same.

(g) Answer any questions as to recording data, etc. requested by Reston Engineering Department.

(h) When recording deeds and deeds of trust in the individual owner after closing, the grantor list is checked again, judgments in four different sets of judgment records are checked again and unindexed instruments in as many as four different places are also rechecked. Next, it is usually necessary to wait in line to record. Once this is accomplished, it is necessary to conform copies as to instrument number, time of recording and deed book and page numbers.

If judgment such as Internal Revenue Service, maintenance and support, etc. or any other problems are discovered, the responsible attorney must consider and determine whether the instrument can be recorded or whether the problem must first be resolved. The Gulf Reston, Inc., Palindrone Corporation and Reston, Va., Inc. lists must be checked and rechecked on every piece or parcel of property being examined up to the minute of recording as they reserve the right to grant subsequent rights of way. This also applies to each resale from one individual to another. Similarly, the Gulf Reston, Inc. record must always be rundown as though they were still the owner.

For each plat, including all notations of any type, rights of way, resubdivisions, easement agreements, etc. must be checked as to each lot or parcel.

(i) It may be necessary to conform copies in various "section files" and update title front sheets in subdivision and individual lot files.

(j) The recording deeds of dedication, resubdivisions, etc. is time consuming as it is necessary to go to the Massey Building (County Office Building in Fairfax) to accomplish the following:

(1) Each dedication must be approved by the county attorney's office on the 11th floor;

(2) Pick up the approved plat from the 7th floor;

(3) Pay any unpaid fees--7th floor;

(4) Return to the Clerk's office at the courthouse, check wach list and entry thereon;

(5) Check all the unindexed instruments, frequently as many as 50 to 80 in number;

(6) Wait in line to record and then record;

(7) Obtain recorder's receipt and fill in time, instrument number, etc., and then conform copies;

(8) Wait for the deed book and page numbers, frequently for as long as an hour or more. (Trial Testimony.)

(38) In certifying a title to real property, an attorney becomes the person ultimately liable in the event a defect is subsequently discovered. This is true even if the purchaser of the real estate secures title insurance for, in that event, the attorney's certification is to the title insurance company. If the attorney has made an error in examining or evaluating the title, the purchaser of the real estate is protected by his insurance company which, in turn, is entitled to proceed against the attorney for any error in the certification. Accordingly, the attorney bears the ultimate responsibility, ethically and financially, for the examination and certification of a title in any transfer of real property. Furthermore, the liability of the attorney is not limited by the purchase price of the property, but increases over the years as the value of the property increases, either through inflation or appreciation. (Trial Testimony.)

(49) Defendant Fairfax Bar Association does not examine and certify titles to real property or provide legal services of any kind. (Trial Testimony.)

(54) There is no evidence that the promulgation of an advisory minimum fee schedule by the Fairfar Bar Association has affected prices adversely to consumers. (Trial Testimony.)

STIPULATIONS OF THE PARTIES

1. On October 26, 1971, the Goldfarbs, who then resided at 5112 North 28th Street, Arlington, Virginia, signed a contract to purchase a home from Wellborn Properties, Inc. in the town of Reston, County of Fairfax, and State of Virginia, a copy of which is annexed hereto as Exhibit 1.

2. The builder who constructed the Goldfarbs' home in Reston and the real estate agent through whom they purchased their home both maintained their offices in Reston, Virginia at the time of the Goldfarbs' purchase.

3. The contract price of the Reston home was $54,500, to be financed by a deposit with the contract of $2,000, a down payment of $37,500 and a $15,000 loan from the Northern Virginia Savings and Loan Association, 5350 Lee Highway, Arlington, Virginia, secured by a first trust on the property. Plaintiffs purchased title insurance, which covered the interest of the mortgagee and their own interests in the property, and obtained the services of an attorney licensed to practice law in the State of Virginia for the purpose of concluding the legal aspects of the purchase, including particularly examination and certification of the state of the title to the property to be acquired.

4. The contract provided that the closing on their home would take place at the offices of A. Burke Hertz, an attorney licensed to practice law in the State of Virginia, who maintains offices at 210 Little Falls Street, Falls Church, Virginia, which is in the county of Fairfax.

5. On November 23, 1971, the Goldfarbs wrote Mr. Hertz concerning the possibility of utilizing his services

in connection with the purchase of their home, and on December 8, 1971, Mr. Hertz replied to that letter. Copies of the two letters are attached as Exhibits 2 and 3.

6. The Goldfarbs then sent letters to 36 other attorneys in Northern Virginia to inquire what fees they would charge for the title examination services. Representative samples of the two types of letters that they sent are annexed hereto as Exhibits 4 and 5.

7. Mr. Goldfarb received 19 written replies to his inquiries, copies of which are annexed hereto as Exhibits 6-24.

8. The Goldfarbs eventually utilized the services of Mr. Hertz. On January 15, 1972, the date of the closing on their home, the Goldfarbs paid Mr. Hertz $522.50 for examination of title, $25 for preparation of title insurance papers, $30 for preparation of a trust mortgage and a note, $30 for preparation of the deed, and $30 for a closing fee, for a total of $637.50. A copy of the Closing Statement is annexed hereto as Exhibit 25.

9. The State Bar is an administrative agency of the Supreme Court of Virginia created by the Supreme Court of Virginia pursuant to the laws of Virginia, including Section 54-49 of the Code. The Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operations of the State Bar which are found in Sections II and IV of Part VI of the Rules of the Supreme Court.

10. The powers of the State Bar have been delegated to the Council of the State Bar, which is comprised of one person from each Judicial Circuit in Virginia, six persons appointed at large by the Supreme Court of Virginia, and

the President, President-Elect and immediate Past President, all of whom serve as *ex officio* members.

11. Each attorney practicing law in Virginia is required by statute and by court rule to be a member of the State Bar. The State Bar is required by statute and rule to investigate alleged violations of the standards of conduct mandated by the Supreme Court Rules, and to report its findings to a court of appropriate jurisdiction for further disciplinary proceedings.

12. Pursuant to Section 54-52 of the Code, the funds for operation of the State Bar are appropriated from a special fund of the State Treasury by act of the General Assembly. The special fund in the State Treasury consists of fees paid by members of the State Bar, the amounts of which are set, pursuant to statute, by the Supreme Court.

13. The Local Bar Associations are associations comprised of attorneys who are members of the State Bar and who, except judicial members, practice law in Northern Virginia. No attorney who practices law in Northern Virginia is required to be a member of any of the Local Bar Associations and many attorneys who practice law in Northern Virginia are not members of any of them.

14. In 1962 and 1969 attorneys who were members of the State Bar prepared on behalf of the State Bar Minimum Fee Schedule Reports, copies of which are annexed hereto as Exhibits 26 and 27.

15. Exhibits 26 and 27 became the basis for the minimum fee schedules published by the Local Bar Associations in 1962 and 1969, copies of which are annexed hereto as Exhibits 28 and 29.

16. The Virginia Statutes have given the Supreme Court of Virginia authority to make questions involving suggested fee schedules and economic reports of the State Bar and of Local Bar Associations questions of ethics under the laws of Virginia.

17. The State Bar has been given authority to issue opinions on matters which the Supreme Court of Virginia says involve questions of ethics.

18. The Supreme Court of Virginia has stated that suggested fee schedules and economic reports of the State Bar and of Local Bar Associations involve questions of ethics within the meaning of paragraph 17.

19. The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on questions of ethics such as Opinions 98 and 170 which relate to minimum fee schedules and to disseminate minimum fee schedule reports, such as Exhibits 26 and 27. Copies of Opinions 98 and 170 are annexed hereto as Exhibits 30 and 31.

20. To the extent that Virginia lawyers' fees for title examinations correspond to the minimum fee schedules published by the Local Bar Associations, a substantial influencing factor is and has been the presence of Opinions 98 and 170 of the Virginia State Bar.

21. The fee of $522.50 which A. Burke Hertz charged the Goldfarbs for title examination on their home is exactly equal to the fee for such examination as calculated by the 1969 Minimum Fee Schedule of the Local Bar Associations (Exhibit 29).

22. The Supreme Court has delegated to the State Bar responsibility for investigating complaints of unprofessional conduct of any member of the State Bar. Such investigations are carried out by district committees which are comprised of attorneys. There is such a committee organized in each of the ten congressional districts of Virginia.

23. Virginia attorneys who provide legal services to prospective home buyers in Reston, Virginia are specifically prohibited by the Code of Professional Responsibility promulgated by the Supreme Court of Virginia from advertising their services or their charges for these services either within or without the State of Virginia.

24. The State Bar has never received a communication from a Local Bar Association regarding the professional conduct of any member of said Associations or of the State Bar, including failure of such members to follow a minimum fee schedule.

25. The State Bar has never initiated or participated in any administrative or judicial action against an attorney for failure to adhere to a minimum fee schedule.

26. Minimum fee schedules of some type are published and circulated in at least 34 states and in the District of Columbia either by the voluntary bar or by the counterpart of the State Bar.

APPENDIX B

FEDERAL REPORTER

VOLUME 497, SECOND SERIES

Lewis H. GOLDFARB and Ruth S. Goldfarb, Appellants,

v.

VIRGINIA STATE BAR and Fairfax County Bar Association, Appellees.

Lewis H. GOLDFARB and Ruth S. Goldfarb, Appellees,

v.

FAIRFAX COUNTY BAR ASSOCIATION, Appellant.

Nos. 73-1247, 73-1248.

United States Court of Appeals, Fourth Circuit.

Argued Nov. 7, 1973.

Decided May 8, 1974.

A class action was brought against a state bar and a county bar association to recover treble damages for violation of federal antitrust laws. Plaintiffs had sought to secure services of attorneys, at lowest possible cost, in examining title on the purchase of homes, and alleged a conspiracy to restrain interstate commerce through the use of a minimum fee schedule. The United States District Court for the Eastern District of Virginia, at Alexandria, 355 F.Supp. 491, Albert V. Bryan, Jr., J., found that the county bar association, but not the state bar, had violated the federal antitrust laws. The county bar association and the plaintiffs both appealed, and the appeals were consolidated. The Court of Appeals, Boreman, Senior Circuit Judge, held that the state bar was exempt from Sherman Act liability and that the county bar association fee schedules were within the "learned profession" exemption as a defense to a Sherman Act violation and did not restrain interstate trade or commerce.

Affirmed as to plaintiff's appeal; reversed as to county bar association's appeal.

Craven, Circuit Judge, filed an opinion concurring in part and dissenting in part.

1. Monopolies ⇨12(1)

State cannot grant immunity to those who violate Sherman Act by authorizing violations, or by declaring that their action is lawful. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. Monopolies ⇨12(16)

Generally, courts will not consider benefits flowing to public when applying Sherman Act to contracts, combinations or conspiracies among individuals, but courts should take cognizance of benefits accruing to public when state is involved in regulation of an industry. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. Monopolies ⇨12(1)

To establish valid exemption of alleged state action from operation of Sherman Act provision as to contracts, combinations and conspiracies, it must be shown that program received authority and efficacy from legislative command, that state conceived theory of control and created machinery for the program, and that statute itself gave state

officials power to restrict competition and maintain price levels. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4. Monopolies ⇐12(1)

Consistently with Sherman Act, legislature may grant to private individuals, once subject to control and regulation, power to conduct day to day operations of program, and those individuals may even promulgate and enforce the regulations that control them, provided their activities are adequately supervised by independent state officials. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

5. Monopolies ⇐12(17)

State bar was exempt from Sherman Act liability for alleged restraint of interstate commerce through use of fixed fees. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Code Va.1950, §§ 54-48, 54-49, 54-50, 54-52.

6. Monopolies ⇐12(17)

County bar association which was voluntary organization composed of members of state bar practicing in county and did not derive its authority or efficacy from state and whose activities were not subject to active independent state supervision was not within "state action" exemption from liability, under Sherman Act, for alleged conspiracy to restrain interstate commerce through use of fixed fees. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Monopolies ⇐12(17)

Restraints upon practice of law are not illegal per se. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

8. Monopolies ⇐12(17)

Practice of "learned profession" is neither trade or commerce, and restraints upon practice of learned profession are not per se violative of Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

9. Attorney and Client ⇐32, 130

Lawyer has professional duty to provide his services at reduced rate to those who need but cannot afford his services.

10. Attorney and Client ⇐32

Advertising and other forms of solicitation of business common to trade and commerce are criminal acts when utilized by lawyers. Code Va.1950, §§ 18.1-388 to 18.1-400, 54-74, 54-78, 54-79.

11. Monopolies ⇐12(17)

County bar association fee schedules were within "learned profession" exemption as defense to Sherman Act violation, and were valid insofar as effect was to restrain competition among attorneys. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Clayton Act, § 1 et seq.; 15 U.S.C.A. § 12 et seq.; Code Va.1950, §§ 18.1-388 to 18.1-400, 54-74, 54-78, 54-79.

12. Monopolies ⇐12(1.1)

Under Sherman Act, it is essential that alleged restraint of trade or commerce be shown to affect interstate commerce; this requirement is jurisdictional under both Constitution and Sherman Act. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

13. Monopolies ⇐12(17)

Where activities of county bar association and its members were carried on wholly within state, jurisdiction under Sherman Act existed only if actions complained of were shown to have "direct and substantial" effect upon interstate commerce. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

14. Courts ⇐406.1(4)
Monopolies ⇐28(8)

Whether actions complained of as violative of Sherman Act had direct and substantial effect upon interstate commerce was mixed question of law and fact relating to jurisdiction, and reviewing court was compelled on appeal to fully examine district court's conclusion, according deference to lower court's findings on questions of fact. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

15. Monopolies ⇐12(1.8)

The service may be utilized by one coincidentally engaged in interstate travel does not establish jurisdiction under Sherman Act, even where one crosses state lines for sole purpose of purchasing the service. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

16. Monopolies ⇐12(17)

County bar association's promulgation of minimum fee schedule did not affect interstate commerce within purview of Sherman Act merely because persons buying homes and paying for title examinations commuted across state lines to their jobs. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

17. Monopolies ⇐12(1.7)

Mere involvement of some facet of interstate commerce has never been sufficient to support jurisdiction under Sherman Act, and fact that service is occasionally utilized to facilitate interstate activities does not subject one providing such service to proscriptions of Sherman Act; to support jurisdiction, involvement must be direct and substantial. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

18. Monopolies ⇐12(1.7)

In considering whether particular activity has direct and substantial effect upon interstate commerce, within purview of Sherman Act, essence or nature of activity is factor to be considered. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

19. Monopolies ⇐12(17)

Act of borrower in securing purchase-money from out-of-state lender makes neither selling of house nor supplying of incidental legal services an interstate activity, within purview of Sherman Act. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

20. Monopolies ⇐12(1.8)

Fact that general local services are occasionally used by persons simultaneously engaged in ancillary interstate transaction to facilitate conduct of that transaction is merely incidental and does not justify federal regulation of competitive restraints upon business which is wholly local in character. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

21. Monopolies ⇐12(17)

Fee schedule system of county bar association did not restrain trade or commerce in violation of Sherman Act. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

Alan B. Morrison, Washington, D. C. (W. Thomas Jacks, Washington, D. C., on brief) for appellants in No. 73-1247 and for appellees in No. 73-1248.

Stuart Dunn, Asst. Atty. Gen. of Virginia, (Andrew P. Miller, Atty. Gen. of Virginia, and T. J. Markow, Asst. Atty. Gen., of Virginia, on brief) for appellee in No. 73-1247. Lewis T. Booker, Richmond, Va. (John H. Shenefield, T. S. Ellis, III, Hunton, Williams, Gay & Gibson, Richmond, Va., on brief) for appellants in No. 73-1248.

Before BOREMAN, Senior Circuit Judge, CRAVEN and FIELD, Circuit Judges.

BOREMAN, Senior Circuit Judge:

This is a class action brought by Lewis and Ruth Goldfarb on behalf of themselves and certain other homeowners in Reston, Virginia, against the Virginia State Bar (State Bar) and the Fairfax County Bar Association (Association) [1]

1. This action originally named the Arlington County Bar Association and the Alexandria Bar Association as additional codefendants. These two codefendants agreed to a consent judgment whereby they were directed to cancel their existing fee schedules and were enjoined from publishing future fee schedules.

to recover treble damages for violation of the federal antitrust laws. They allege that the State Bar and the Association have conspired to restrain interstate commerce through the use of fixed fees. Commencing with State Bar Opinion 98 issued on June 1, 1960, the State Bar announced its intention to discipline any attorney who repeatedly charged less than the fees set forth in the minimum fee schedule adopted by his *local* bar association when motivated by a desire to "increase his practice with resulting personal gain." In 1962 and again in 1969 the State Bar published a "Minimum Fee Schedule Report" intended for the guidance of local bar associations in establishing minimum fee schedules. On June 12, 1969, the Fairfax County Bar Association promulgated a "Minimum Fee Schedule" which closely followed the guidelines set forth by the State Bar. The "Minimum Fee Schedule" was described as "advisory" and was never circulated to Association members; members who desired a copy of the schedule had to specifically request it at the Fairfax County Courthouse. Nevertheless the fee schedule states that "consistent and intentional violation of the suggested minimum fee schedule for the purpose of increasing business can, under given circumstances, constitute solicitation" and result in disciplinary action as provided in State Bar Opinion 98. No disciplinary action has been brought against any member of the Association for failure to adhere to the fee schedule, although the right of the State Bar to do so was reaffirmed in State Bar Opinion 170 issued on May 28, 1971.

On October 26, 1971, the Goldfarbs contracted to purchase a home in Reston, Virginia. To finance the purchase of the home the Goldfarbs secured a home mortgage. The mortgagee required the Goldfarbs to purchase title insurance; this necessitated the employment of a Virginia attorney to conduct a title examination of the real estate to be purchased.

The Goldfarbs contacted numerous attorneys in Northern Virginia in an attempt to secure the necessary legal services at the lowest possible cost.[2] The record demonstrates that the Goldfarbs were unable to secure these services at a rate less than that prescribed by the "Minimum Fee Schedule." We accept the finding of the district court that "[a] significant reason for the inability of the Goldfarbs to obtain legal services for the examination of the title to their home for less than the fee set forth in the Minimum Fee Schedule . . . was the operation of the minimum fee schedule system."[3]

The district court severed the question of liability from that of damages. As to the State Bar the court found no liability and the Goldfarbs have appealed that decision. The court held that the Association had violated the federal antitrust laws and was liable for damages, if any, sustained by members of the plaintiff class. The Association has appealed from that decision.

These appeals have been consolidated for consideration by this court. We first address our attention to the contentions of the Goldfarbs with respect to the State Bar and then proceed to consideration of the issues raised by the Association in its appeal.

I. The Parker v. Brown Exemption

Part A—The State Bar

The Goldfarbs complain of the issuance of the 1962 and 1969 fee schedule reports by the State Bar. They also question the validity of State Bar Opinions 98 and 170 which in effect state that it is unethical for an attorney to habitually charge less than the fee called for in an established fee schedule. Plaintiffs contend that the fees charged for legal services incident to the purchase of a home in Northern Virginia have been raised, fixed and maintained at an artificial and noncompetitive level by the State Bar's activities. It is asserted that such activities are in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.[4]

The district court concluded that the State Bar had not violated the Sherman Act. The court held that the State Bar had acted within the scope of its statutory or rule created authority. Citing Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), in support of its determination that the State Bar was not liable under the Sherman Act, the district court stated:

> "The rationale behind the holding of Parker v. Brown, *supra*, that the Sherman Act restrains only actions of private persons and not state action, applies equally to both a state's judicial actions and its legislative actions."

Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 496 (E.D.Va.1973).

Prior to undertaking to apply the standards of the *Parker* exemption to the facts of this case we deem it advisable to consider the facts and holdings of Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as well as those in Asheville Tobacco Board of Trade, Inc. v. F.T.C., 263 F.2d 502 (4 Cir. 1959), and Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248 (4 Cir. 1971).

In *Parker* a state agricultural proration program for the raisin industry was alleged to be in conflict with federal antitrust laws. Noting the significance of the raisin industry and agriculture in general to the economy of the State, the California Legislature passed the California Agricultural Prorate Act[5] to insure stability in the marketing of agricultural commodities produced in the State. Brown, a producer and packer of raisins, complained that the programs and policies initiated in response to the Prorate Act violated the Sherman Act. The Court held that the programs were permissible, even assuming the action would have been violative of the antitrust laws had the same plan been adopted by private individuals operating without a legislative mandate.

> "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its *authority* and its *efficacy* from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."

Parker v. Brown, 317 U.S. 341, 350–351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943) (accent added). The Court emphasized that the Sherman Act prohibited *individual* action and not *state* action. Applying this principle to the facts of *Parker*, the Court noted that it was the State which had created the machinery for establishing the prorate program. It was the State, acting through the Agricultural Prorate Advisory Commission,[6] which had adopted the

2. On the lighter side we note in passing that it appears that the Goldfarbs were actively seeking what might be termed "inexpensive assistance of counsel." This should not be confused with "ineffective assistance of counsel," a term often found in Habeas Corpus petitions. We do not find it necessary to consider whether, in any sense, these terms might bear some relationship, one to the other.

3. The opinion of the district court is reported at 355 F.Supp. 491 (E.D.Va.1973).

4. 15 U.S.C. § 1 provides, in part:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

5. Act of June 5, 1933, ch. 754, Statutes of California of 1933, as amended by chs. 471 and 713, Statutes of 1935; ch. 6, Extra Session, 1938; chs. 363, 548 and 804, Statutes of 1939; and chs. 993, 1150 and 1186, Statutes of 1941.

6. The Commission consisted of nine members. The Director of Agriculture, a state official, was an *ex officio* member. The other eight members were appointed to four

program and enforced it with penal sanctions in the execution of a governmental policy.

[1] The *Parker* decision contains cautionary language directed at the states. A state cannot grant immunity to those who violate the Sherman Act by authorizing the violations, or by declaring that their action is lawful.[7] The question then arises: what factors are important in determining if state legislation creates a valid state action exemption or merely creates a shelter for immunity from the Sherman Act.

[2, 3] The *Parker* Court considered three factors in deciding that the California Agricultural Prorate Act was valid state action. First, the Court noted that the declared purpose of the Act was to conserve the agricultural wealth of the State and prevent its economic waste.[8] Thus, the Act was for the benefit of the public;[9] its purpose was not to give an unfair advantage or monopolistic position to producers and sellers. Secondly, the Court stressed that the regulation of the industry was actively and continually supervised by the State through its Commission.[10] Finally, the Court emphasized that the program received its authority and efficacy from the legislative command. The State conceived the theory of control and then created the machinery for the program.[11] The Act itself gave state officials the *power* to restrict competition among the growers and maintain certain price levels.[12] The satisfaction of these three factors is essential to establish and support a valid claim of the *Parker* exemption.

In Asheville Tobacco Board of Trade, Inc. v. F. T. C., 263 F.2d 502 (4 Cir. 1959), this court refused to apply the *Parker* exemption to local tobacco boards of trade. For many years tobacco boards of trade existed at common law in North Carolina by common consent or by contract among the interested individuals. The various boards exercised their power to promulgate regulations governing auction sales of tobacco. Finally the Legislature of North Carolina passed N.C.Gen.Stat. § 106–465[13] authorizing local tobacco boards of trade to make reasonable rules and regulations for the economic and efficient handling of the sale of leaf tobacco at auction. The Act did not authorize the control of prices or the making of rules and regulations in restraint of trade. The complained of activity concerned the Asheville Tobacco Board of Trade's regulations governing the allotment of selling time to warehouses.[14] The F.T.C. held that the regulations violated the intent and meaning of § 5 of the Federal Trade Commission Act.[15] On appeal the Asheville Board contended that its activities were exempt under the rationale of *Parker*. In refusing to apply the *Parker* exemption this court concluded that the regulations and activities were not state action but were individual activities subject to the jurisdiction of the F.T.C.

In both *Parker* and *Asheville* there was legislation concerning an industry important to the state and yet the courts reached opposite results. However, the cases are reconcilable. The key feature distinguishing the cases is North Carolina's failure to heed the cautionary language of *Parker*.[16] Keeping in mind the three factors helpful in determining whether state legislation creates a valid state action exemption or merely creates a shelter for immunity from the anti-trust laws, it is obvious from the facts of *Asheville* that the *Parker* exemption was not applicable. In *Parker* the declared purpose of the legislation was to conserve and economically use California's agricultural resources; the benefits of the Act accrued to the public. In *Asheville*, although the legislation involved an industry important to the State, the thrust of the Act concerned the self-regulation of auction procedures by warehousemen, sellers and buyers; that Act was not aimed at benefiting the public in any meaningful way. "A tobacco board of trade is organized primarily for the benefit of those engaged in the business . . . . ."[17] In *Parker* the regulation of the industry was actively supervised by state officials. N.C.Gen.Stat. § 106–465 did not provide for any supervision by a state agency or official. "They [the boards] are not accountable to the State, and are not supervised in any manner by State officials."[18] This court in *Asheville* noted that the only possible state involvement was the legislative act condoning the work of the boards and several court decisions involving disputes among members of the various boards. The court reasoned that this was not the active state supervision required by *Parker*. Finally, in *Parker* the program received its authority and efficacy from legislative command. In *Asheville* the

year terms by the Governor and confirmed by the State Senate. All members were required to take an oath of office.

7. "But such action must be state action, not individual action masquerading as state action." Asheville Tobacco Board of Trade, Inc. v. F.T.C., 263 F.2d 502, 509 (4 Cir. 1959).

8. Parker v. Brown, 317 U.S. 341, 346, 63 S. Ct. 307, 87 L.Ed. 315 (1943).

9. As a general proposition courts will not consider benefits flowing to the public when applying the Sherman Act to contracts, combinations or conspiracies among individuals. The decisions we have cited conclusively demonstrate that the prohibitions of the statute [Sherman Act] apply even though the parties to a contract indulge the belief that the agreement may have beneficial results and actually show that in some respects the public is benefited thereby. Congress has determined that the greater good is served by the maintenance of free competition and its decision in the field of interstate commerce must control.

Pennsylvania W. & P. Co. v. Consolidated G. E.L. & P. Co., 184 F.2d 552, 559 (4 Cir. 1950).

It is apparent from *Parker*, however, that courts should take cognizance of the benefits accruing to the public when a state is involved in the regulation of an industry.

10. Parker v. Brown, 317 U.S. 341, 352, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

11. *Id.* at 350 and 352.

It is interesting to note that it was not a case where individuals initially decided to take action, conspired to regulate competition and prices in the industry, and then received governmental approval through legislative action. On its surface such a sequence of events would appear to be an attempt by a state to grant immunity to those violating the Sherman Act. Indeed such "after the fact" legislation may create a rebuttable presumption that the state was attempting to camouflage individual action as state action.

12. *Id.* at 346.

13. N.C.Gen.Stat. § 106–465 provides in part:

Tobacco warehousemen and the purchasers of leaf tobacco, at auction, on warehouse floors, are hereby authorized to organize . . . tobacco boards of trade in the several towns and cities in North Carolina in which leaf tobacco is sold on warehouse floors, at auction.

Such tobacco boards of trade as may now exist, or which may hereafter be organized, are authorized to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors . . . .

. . . . . .

Nothing in this section shall authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade.

14. A warehouse owned by C. T. Day was handling twenty to twenty-five percent of the leaf tobacco sales in Asheville. Because of the Board's regulations, however, Day's warehouse was only allotted eight to nine percent of the total selling time. Both Day and the F.T.C. claimed the regulations were directly restraining his trade.

15. 15 U.S.C. § 45.

Although the *Asheville* case involved the Federal Trade Commission Act instead of the Sherman Act, the latter being the controlling statute in *Parker* and in the instant case, that fact had no bearing on the ultimate result. It appears that the exemption can be applied regardless of the specific antitrust law involved.

16. [A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . .

Parker v. Brown, 317 U.S. 341, 351, 63 S.Ct. 307, 314, 87 L.Ed.2d 315 (1943).

17. Asheville Tobacco Board of Trade, Inc. v. F.T.C., 263 F.2d 502, 509 (4 Cir. 1959).

18. *Id.* at 510.

regulations and controls on auction procedures were initially conceived and given effect by the interested individuals. Only at a later point in time did the Legislature approve such activities,[19] and even then the Act specifically denied the boards the power to restrict competition.[20] Viewing the cases in this light, *Asheville*, even though reaching a contrary result, bolsters our reading and understanding of *Parker*.

[4] One further point found in *Asheville* is helpful in any analysis of the *Parker* exemption. In *Asheville* the court held that:

> "It [the state] may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials." [21]

Thus a legislature may grant to private individuals, the ones subject to control and regulation, the power to conduct the day to day operations of the program. Those individuals may even promulgate and enforce the regulations that control them, provided their activities are *adequately supervised by independent state officials*.

In Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248 (4 Cir. 1971), one issue was whether certain predatory promotional activities of Virginia Electric & Power Co. (VEPCO) were sufficiently regulated by a state agency, the State Corporation Commission (SCC), to qualify under the *Parker* exemption. Although the Virginia Legislature ultimately controls domestic public utilities,[22] the day to day regulation and control of that industry are conducted by SCC. VEPCO, through an agressive installation campaign, had made significant inroads into areas previously dominated by natural gas. Washington Gas Light Co. claimed these activities placed VEPCO in violation of the Sherman Act. On appeal VEPCO argued that the *Parker* exemption applied. The court discussed *Parker*, *Asheville* and other cases in concluding that the utility's activities regulated by SCC did fall within the exemption. The court noted that there was no doubt that SCC was an arm of the State, possessing both the authority and power to regulate through legislative command, and that requirement of *Parker* was thus met. It was also clear that regulation of giant utility concerns was for the protection of the public. The most difficult question, however, concerned the remaining cautionary factor of *Parker*: whether there was the sufficient state supervision.[23] Washington Gas Light Co. argued that SCC's inaction, its failure to give approval or disapproval of VEPCO's activities, made the actions of VEPCO those of an individual and not those of the State. The court responded:

> "The argument is not without merit but the conclusion is not inevitable unless one equates administrative silence with abandonment of administrative duty. It is just as sensible to infer that silence means consent, i. e., approval." [24]

Having discussed the *Parker* exemption at length we consider the facts of the case before us. The Legislature of Virginia has determined that the practice of law within the State should be controlled and regulated by the Virginia Supreme Court of Appeals (Virginia court). Virginia Code Ann. § 54–48

19. Such a sequence of events is in stark contrast to the facts of *Parker*. See note 11, *supra*. Although not specifically mentioned, the *Asheville* court appears to have inferred that such "after the fact" legislation was an attempt by the State to camouflage individual action as state action.

20. See note 13, *supra*.

21. 263 F.2d at 500.

22. Va.Code Ann. § 56-2 (Michie 1969 Replacement Volume).

23. Parker v. Brown, 317 U.S. 341, 352, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

24. Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 252 (4 Cir. 1971).

(Michie 1972 Replacement Volume), provides:

> "The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:
>
> (a) Defining the practice of law.
>
> (b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics.
>
> (c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law."

The Legislature then established an administrative agency, presumably to relieve the Virginia Court of the day to day supervision and regulation of the legal profession. The State Bar is the administrative agency of the Virginia court. By enacting Va.Code Ann. § 54–49 (Michie 1972 Replacement Volume), the Legislature authorized the Virginia Court to "prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court . . . ." [25]

Paraphrasing, some of the pertinent stipulations of the parties here are as follows:

> The Virginia statutes have given the Virginia court authority to make questions involving suggested fee schedules and economic reports of the State Bar questions of ethics under the laws of Virginia.
>
> The Virginia court has stated that suggested fee schedules and economic reports of the State Bar involve questions of ethics and that the State Bar has the authority to issue opinions on such ethical matters.
>
> The State Bar has been given authority by the Virginia court to issue opinions similar to Opinions 98 and 170, which relate to minimum fee schedules, and to disseminate minimum fee schedule reports.

From the stipulations it is clear that the Legislature has made suggested fee schedules and economic reports a part of the regulatory power of the Virginia court and its administrative agency, the State Bar. Indeed, such matters have been regulated by issuance of two fee reports and Opinions 98 and 170.

In the instant case, as with *Parker* and *Asheville*, there is state legislation concerning an "industry" important to the state.[26] Thus, our initial concern is whether Virginia has heeded the cautionary language of Parker

The Virginia Legislature has provided for regulation of attorneys through a code of ethics governing professional conduct. That code's *primary* functions are to protect rights and interests of clients and to instill public confidence in the legal profession and our system of justice.[27] We would be less than candid

25. Va.Code Ann. § 54-49 (Michie 1972 Replacement Volume), also provides that the State Bar should be an integrated bar, i. e., all persons practicing law in the State are required to be members. § 54-50 allows the Virginia court to assess annual fees to practicing lawyers in the State. These fees are paid into the Virginia Treasury, credited to the State Bar Fund (§ 54-52) and used in administering the regulatory functions of the State Bar.

26. Both government and individuals rely on the legal profession for guidance in their daily transactions. The practice of law is essential to the smooth functioning of our socio-economic system, a system based on the theory of "rule by law." Indeed, a responsible legal "industry" is vital to Virginia and every state of the Union. The parties have not argued to the contrary.

27. It is apparent from a reading of the nine Canons that the Virginia Code of Professional Responsibility is primarily for the benefit of the public and especially for those members of the public who become clients of attorneys. The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationship with the public and the legal system. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules of the ethics code are derived.
(1) A lawyer should assist in maintaining the integrity and competence of the legal profession.

if we did not admit that lawyers, those who are regulated, benefit from certain provisions of the Code of Professional Responsibility. We cannot ignore the fact that in some instances adherence to a suggested minimum fee schedule is financially helpful to the individual attorney. Still, minimum fee schedules are only one factor among a multitude of variables that interrelate to provide the public with competent legal service.[28] It is probable that the raisin growers and sellers in *Parker* received some spin-off benefits from certain sections of the Agricultural Prorate Act. The point is that the regulation there was aimed primarily at benefiting the public. In *Asheville* the regulations involved were primarily for the benefit of those regulated; the public received little, if any, tangential benefits. It is clear that the desired goal of the Code of Professional Responsibility is to benefit clients and the public in general.[29] It is manifestly unfair to dissect a state's regulatory program into its various component parts, parts that were meant to interrelate, and then to declare that, because some factors may benefit those to be regulated, the program falls outside the *Parker* exemption.[30] Since the primary benefits of the regulation of lawyers accrue to the public, the first factor considered under the cautionary language of *Parker* has been satisfied here.

The second factor to be considered is whether there is *active* supervision by *independent* state officials. In *Parker* the supervising body was composed of the Director of Agriculture and eight members appointed by the Governor. They actively supervised the prorate program and the Court concluded that this factor had been satisfied. In *Asheville, supra*, the regulatory body was composed of members neither elected nor appointed; there were no independent state officials regulating the program and there was no active state supervision. In the instant case, the State Bar, which is designated by statute as the controlling state agency, is composed of those to be regulated.[31] It is doubtful that the State Bar, standing alone, could be viewed as the type of independent regulatory agency called for in *Parker*. This court in *Asheville* said that a state could allow those persons subject to controls to participate in the regulation, *provided* their activity is adequately supervised by independent state officials. Applying this proviso of *Asheville*, there is no question that the Judges of the Virginia court are sufficiently *independent*. Still, to meet this requirement of *Parker* the Virginia court must *actively* supervise the State Bar. It is stipulated that the Virginia court initially gave authority to the State Bar to issue suggested fee schedules and opinions similar to Opinions 98 and 170 concerning adherence to the schedules. The Virginia court also officially adopted the Code of Professional Responsibility. From time to time the Virginia court has employed suggested fee schedules in establishing attorney fees in cases before it. Finally, the Virginia court's inaction with regard to specifically approving or disapproving the schedules in question should not be construed as a failure to adequately supervise. Adopting and applying the logic found in *Washington Gas Light*, one should not equate silence with abandonment of the duty to supervise. "It is just as sensible to infer that silence means consent, i. e., approval."[32] The Virginia court has the authority to regulate and supervise the State Bar; we will not infer abandonment of that authority because of claimed inactivity. The active independent state supervision required in *Parker* is provided here by the Virginia court.

(2) A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.
(3) A lawyer should assist in preventing the unauthorized practice of law.
(4) A lawyer should preserve the confidences and secrets of a client.
(5) A lawyer should exercise independent professional judgment on behalf of a client.
(6) A lawyer should represent a client competently.
(7) A lawyer should represent a client zealously within the bounds of the law.
(8) A lawyer should assist in improving the legal system.
(9) A lawyer should avoid even the appearance of professional impropriety.

For a detailed discussion of the Canons and more specifically the Ethical Considerations and Disciplinary Rules see Rules of the Supreme Court of Appeals of Virginia, Part 6, § I-II (as amended Jan. 1, 1971).

28. It is interesting to note what a minuscule part suggested fees play in the total scheme of regulation. The Virginia Code of Professional Responsibility is divided into nine major sections, each headed by one of the Canons listed in note 27, *supra*. Under each of the nine Canons there are Ethical Considerations (advisory in nature) and Disciplinary Rules (mandatory in nature). Concentrating on the Disciplinary Rules, those that attorneys must follow, we note that they are broken down further into various sections and subsections. To find reference to minimum fees in the Disciplinary Rules we must look to Canon 2. The Disciplinary Rules of that Canon have ten major divisions. (DR 2-101 to DR 2-110). DR 2-106 has three subdivisions. Under subdivision (B) there are eight separate sections. Section 3 refers to minimum or customary fees charged in the locality. Clearly minimum fees play but a small part in the total picture of regulation of the "industry." For a more detailed listing of the sections of DR 2-106 see note 30, *infra*.

29. Our conclusion that the ethics code primarily benefits the public is bolstered by the logic of the United States Supreme Court in Lathrop v. Donohue, 367 U.S. 820, 843, 81 S.Ct. 1826, 1838, 6 L.Ed.2d 1191 (1961).

> Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State . . . . It cannot be denied that this is a legitimate end of state policy.

Additional support can be found in the case of Semler v. Oregon Bd. of Dental Examiners, 294 U.S. 608, 612, 55 S.Ct. 570, 572, 79 L.Ed. 1086 (1935).

> The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises . . . . And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.

30. Such a myopic view can be misleading. Although minimum fees may in some cases provide more than adequate compensation for services rendered, their appearance in DR 2-106 is for the purpose of establishing *reasonable* fees. The ethics code states that it is necessary to establish what is a reasonable fee to insure that clients are not charged an excessive fee. In part, the Virginia Code of Professional Responsibility DR 2-106 (Jan. 1, 1971), provides:

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) *The fee customarily charged in the locality for similar legal services.*
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent. [Emphasis added.]

31. The State Bar is controlled by its Council, composed of six members appointed by the Supreme Court of Virginia, and the President, the immediate Past-President, and the President-Elect of the State Bar, as *ex officio* members; additional members of the Council, composing the bulk of the membership, are elected by lawyers from the judicial circuits of State.

32. Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 252 (4 Cir. 1971).

We have little difficulty in finding the presence of the third factor to be considered in light of the cautionary language of *Parker*. The parties have stipulated that the regulation program here received its authority and efficacy from legislative command. The Act involved gave the Virginia court the power to restrict competition among those in the legal profession. The Virginia Legislature created the machinery for regulation. Lawyers did not conceive and implement the plan and then seek "after the fact" legislative acceptance as was the case in *Asheville*.

[5] We find state action here concerning a business important to the State. From the foregoing analysis it is apparent that Virginia has heeded the cautionary language of *Parker*. Here we are not considering sham legislation granting immunity to those who violate the Sherman Act. The State Bar avoids liability under the Sherman Act because of the *Parker* exemption.

Part B—Fairfax County Bar Association

[6] The Fairfax County Bar Association is a voluntary organization composed of members of the State Bar practicing in Fairfax County, Virginia. The Association is a private organization and does not derive its authority or efficacy from the State. While it is clear that the State Bar recognizes local bar associations it does not regulate or supervise local bar activities.

Pursuant to the suggestion of the State Bar in its "Minimum Fee Schedule Report" the Fairfax County Bar Association published a "Minimum Fee Schedule." Although described as "voluntary" by the Association it is clear from the record that all or nearly all of the Association's members charged fees equal to or exceeding the fees set forth in the schedule for title examinations and other services involving real estate. The Association has no power to discipline violators but has clearly relied upon and reinforced the State Bar's threat to discipline habitual violators of locally established minimum fee schedules.

The district court held that the Association was in violation of the Sherman Act, 15 U.S.C. § 1. With respect to jurisdiction the court found that the real estate services provided by members of the Association sufficiently affected interstate commerce to warrant federal jurisdiction under the Sherman Act. The court specifically found that the Association was engaged in a form of price-fixing and that it was not exempt from prosecution under the *Parker* exemption or the "learned profession" exemption.

On appeal it has been argued by the Association that the *Parker* exemption should be extended to cover the Association's activities. Applying the three factors from the cautionary language of *Parker*, we note first that the Association has been engaged in the same basic activities as the State Bar. We have no doubt that the primary aim of those activities was to benefit the public just as it was the aim of the State Bar. However, the remaining cautionary requirements of *Parker* were not satisfied by the Association. The Fairfax County Bar Association's regulatory activities are not founded on a legislative command as are the activities of the State Bar. More fatal to the application of *Parker* to the Association is the fact that there is no active independent state supervision. The Virginia court has no direct control over local bar associations. Although the Virginia court could eventually pass judgment on local bar activities, the process might entail lengthy court proceedings. The active independent state supervision required in *Parker* to insure that abuses do not occur within a regulatory scheme would be absent. We decline to extend the *Parker* exemption to the Fairfax County Bar Association.

On appeal the Association also contends that the legal profession is a "learned profession," that it is not subject to the antitrust laws and that the activities complained of do not restrain

interstate trade. We find it necessary to consider the allegations of the Goldfarbs and the facts as found by the district court in some detail to resolve these issues on appeal.

The Goldfarbs contend that the Association by promulgation of the minimum fee schedule has restrained trade or commerce among the several states in violation of the Sherman Act. They allege (1) that the fee schedule restrains attorneys in the practice of their profession resulting in artificially high fees, and (2) that the fee schedule restrains those engaged in the financing and insuring of home mortgages by arbitrarily inflating a component part of the cost of securing housing. We discuss separately each of these alleged forms of restraint.

II. The "Learned Profession" Exemption

It is abundantly clear from the record before us that the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County. The question before us, however, is whether this is a "restraint of trade or commerce among the several States" and therefore a violation of the Sherman Act.

Throughout the development of federal antitrust law there has been judicial recognition of a limited exclusion of "learned professions" from the scope of the antitrust laws. This exclusion is not a favor bestowed upon professionals by the courts as a "professional courtesy"; the exclusion arises from the language of the statutes and the peculiar nature of the services rendered.

[7, 8] The Sherman Act declares that every "restraint of trade or commerce among the several States" is illegal. Restraints upon the practice of law are not illegal *per se* because that which is restrained (*i. e.*, the practice of a "learned profession") is neither trade nor commerce. The "learned profession" exemption rests upon two cases decided by the United States Supreme Court. Those cases hold that one engaged in the practice of a profession "follow[s] a profession and not a trade" [33] and that such "personal effort, not related to production, is not a subject of commerce." [34] Even when the Supreme Court substantially expanded the scope of the Sherman Act by defining trade in its broadest sense, it recognized that the practice of a "learned profession" is not a trade.[35] While more recent decisions of the Supreme Court have refused to pass upon the validity of

33. Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 653, 51 S.Ct. 587, 592, 75 L.Ed. 1324 (1931) (construing the Federal Trade Commission Act, 15 U.S.C. § 45, with reference to the Sherman Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12 et seq.).

34. Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 209, 42 S.Ct. 465, 466, 66 L.Ed. 898 (1922); *see also* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 573, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944) (dissenting opinion of Chief Justice Stone).

35. Mr. Justice Sutherland in construing the phrase "restraint of trade" as it appears in § 3 of the Sherman Act quoted with approval the following statement of Mr. Justice Story in The Schooner Nymph, 18 F.Cas. p. 506 (No. 10,388):

> "The argument for the claimant insists, that 'trade' is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion, that such is not the true sense of the word, as used in the 32d section. In the first place, the word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*."

Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 436, 52 S.Ct. 607, 610, 76 L.Ed. 1204 (1932). While that case was decided under Section 3 of the Sherman Act and the allegations in the instant case relate to Section 1, we see no reason to assign a different meaning to the word "trade" as it appears in Section 1.

the "learned profession" exemption,[36] we find nothing to suggest that it should not continue to be applied in appropriate cases. Lower federal courts have continued to recognize and apply this exemption.[37]

[9, 10] It is not difficult to understand why the learned professions have been treated differently than other occupations by the courts with respect to the antitrust laws. As Justice Jackson, speaking for the Court in United States v. Oregon State Medical Society, 343 U. S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), said, "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." The legal profession has rejected the maxim of *caveat emptor* as a standard of conduct.[38] Unlike the mechanic or the butcher, a lawyer has a professional duty to provide his services at a reduced rate to those who need but cannot afford his services.[39] Advertising and other forms of solicitation of business common to trade and commerce are criminal acts when utilized by lawyers.[40] In view of the special form of regulation already imposed upon those in the legal profession the courts have been reluctant to superimpose upon the profession the sanctions of the antitrust laws, many of which are in direct contravention of existing legal and ethical restrictions.[41]

[11] We believe that much of the criticism of this "learned profession" exemption is the result of a misunderstanding of its nature and extent. The exemption is not a personal immunity from prosecution, but is rather a recognition that the Sherman Act prohibits only those restraints which are upon trade or commerce. The occupation of one who violates the Sherman Act is irrelevant. If a group of doctors conspire to obstruct the interstate sale of health insurance their professional status would be no defense.[42] On the other hand, if a group of doctors conspire to restrain the practice of another doctor there is no Sherman Act violation because that which is restrained (*i. e.*, the practice of a learned profession, medicine) is neither trade nor commerce.[43] With that distinction in mind, it should be clearly discernible that the impact of the Association's fee schedule in the instant case upon competition among attorneys for real estate work is not within the scope of the Sherman Act.

We do not intend to suggest that any learned profession is above the law. The "learned profession" exemption is a defense to a Sherman Act violation only where the restraint is upon the learned profession itself. That exemption is applicable only to those matters with respect to which an accord must be reached between the necessities of professional regulation and the dictates of the antitrust laws. We therefore conclude that the promulgation of a fee schedule has a sufficient part in the overall scheme devised by the State of Virginia to regulate the legal profession to claim the form of limited immunity to antitrust prosecution available under the "learned profession" exemption. Thus, fee schedules are valid insofar as the effect is to restrain competition among attorneys.

III. Interstate Commerce

We next turn our attention to the allegation that the fee schedule restrains those engaged in the financing and insuring of home mortgages by inflating a component part of the cost of securing housing. Since that which is allegedly restrained is not a learned profession, the "learned profession" exemption does not apply here. There is, of course, no allegation that the attorneys conspired for the express purpose of restraining the trade or commerce of those engaged in the real estate industry. However, even if the objects of conspirators were to restrain activities not protected by the Sherman Act, "they must take their victims' involvement in interstate commerce as they find them." Lehrman v. Gulf Oil Corporation, 464 F.2d 26, 36 (5 Cir. 1972). Thus, the fee schedule "may come within the purview of federal antitrust jurisdiction if the requisite effect on interstate commerce is shown." Brett v. First Federal Savings & Loan Association, 461 F.2d 1155, 1157 (5 Cir. 1972).

[12] Under the Sherman Act it is essential that the alleged restraint of trade or commerce be shown to affect *interstate* commerce. This requirement is jurisdictional under both the Constitution[44] and the Sherman Act.[45] In examining the question of whether the Association's activities constitute a restraint of *interstate* trade for jurisdic-

36. American Medical Ass'n v. United States, 317 U.S. 519, 528, 63 S.Ct. 326, 328, 87 L.Ed. 434 (1943) ("Much argument has been addressed to the question whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act. . . . [W]e need not consider or decide this question."); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 491–492, 70 S.Ct. 711, 715, 94 L.Ed. 1007 (1950) ("we do not intimate an opinion on the correctness of the application of the term [trade] to the professions.").

37. Riggall v. Washington County Medical Soc'y, 249 F.2d 206, 208 (8 Cir. 1957); Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc., 139 U.S.App.D.C. 217, 432 F.2d 650, 654 (1970).

38. A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

Canon 5, Virginia Code of Professional Responsibility, DR 5-104(A).

A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

Canon 2, Virginia Code of Professional Responsibility, DR 2-106(A).

39. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.

Canon 2, Virginia Code of Professional Responsibility, EC 2-25.

It is customary in many jurisdictions to appoint lawyers for indigent criminal defendants by selecting lawyers at random from those practicing before the court. Agreement to accept such employment at the statutory rate, even if less than the schedule fee or the appointed attorney's customary fee, is often a condition of admission to practice before the court.

40. The common law crimes of barratry, maintenance, and champerty are recognized in Virginia and have been codified in Code of Virginia §§ 18.1-388 through 18.1-399 (Michie 1960 Replacement Volume). Although the statutory provisions relating to maintenance and champerty were declared unconstitutional in National Ass'n for the Advancement of Colored People v. Harrison, 202 Va. 142, 116 S.E.2d 55 (1960), the court made it clear that maintenance and champerty continue to be illegal under Code of Virginia §§ 54-74, 54-78, and 54-79 (Michie 1972 Replacement Volume), insofar as solicitation is involved.

41. [T]he proscriptions of the Sherman Act were 'tailored . . . for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions.

Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc., 139 U.S.App.D.C. 217, 432 F.2d 650, 654 (1970) (footnotes omitted), cert. denied, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1970); *see also* Greene v. Howard Univ., 134 U.S.App.D.C. 81, 412 F.2d 1128, 1133 (1969).

42. American Medical Ass'n v. United States, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (1943). The Court declined to resolve the question of whether the practice of medicine was a "trade" within the meaning of the Sherman Act. What the Court held was that the sale of health insurance was interstate trade and that a conspiracy among doctors to restrict it violated the Sherman Act.

43. Riggall v. Washington County Medical Soc'y, 249 F.2d 206 (8 Cir. 1957).

44. Article 1, section 8, clause 3, of the Constitution of the United States vests Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States . . . ." Pursuant to that broad grant of power Congress has enacted the Sherman Antitrust Act, 15 U.S.C. §§ 1-7.

45. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .
15 U.S.C. § 1.

tional purposes, we are guided by cases construing both the commerce clause and the Sherman Act.[45]

[13, 14] It is undisputed that the activities of the Association and its members were carried on wholly within the State of Virginia. Therefore, jurisdiction will exist only if the actions complained of are shown to have a "direct and substantial" effect upon interstate commerce. Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416, 418 (5 Cir. 1972); United States v. Bensinger Co., 430 F.2d 584, 588 (8 Cir. 1970). No satisfactory formula has yet been fashioned which would encompass the myriad of factors to be considered in determining whether the effect upon interstate commerce is "direct and substantial." However, since it is a mixed question of law and fact which relates to jurisdiction, we are compelled on appeal to fully examine the conclusion of the district court. In doing so we are ever mindful of the deference to be accorded the lower court's findings on questions of fact.

From the findings of fact set forth in the following passage, the district court concluded that jurisdiction did exist:

> "[A] significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia. All or nearly all of the lenders making such loans require, as a condition of making the loan, that the title to the property involved be examined and that title insurance be furnished and paid for by the home buyer-mortgagor. This alone warrants the conclusion that interstate commerce is sufficiently affected to sustain jurisdiction under the Sherman Act. There is also uncontradicted evidence that a large percentage of persons who live in Fairfax County work outside of Virginia and that significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia. The fees charged for the title examination and insurance just mentioned are covered by the minimum fee schedule here in question." [47]

After an extensive examination of the case law and upon careful consideration of the facts enumerated above we are left with the firm conviction that the activities of the Association did not have a direct and substantial effect upon *interstate* commerce and that jurisdictional requirements are not met.

[15, 16] First, the finding by the district court that many of the residents of Fairfax County, including the Goldfarbs, work outside of Virginia is totally irrelevant. The fact that a service may be utilized by one coincidentally engaged in interstate travel will not establish jurisdiction under the Sherman Act.[48] This is true even where one crosses state lines for the sole purpose of purchasing the service.[49] The interstate commerce which is allegedly affected by the fee schedule is the financing of home mortgages; the fact that the mortgagor commutes across state lines to his job is of no interest to the mortgagee or to this court.

[17] If jurisdiction exists in this case, it must be based upon the district court's finding that a title examination was required by out-of-state lenders and guarantors who were involved in a "significant" portion of the home purchases in Fairfax County. For that finding to be a basis for jurisdiction, it must be shown that the minimum fee arrangement with respect to real estate services had the requisite effect upon the interstate financing and insuring of home mortgages. The fact that a service is occasionally utilized to facilitate interstate activities does not subject the one providing that service to the proscriptions of the Sherman Act. United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947); Evanston Cab Co. v. Chicago, 325 F.2d 907 (7 Cir. 1963). Mere involvement with some facet of interstate commerce has never been sufficient to support jurisdiction under the Sherman Act.[50] To support jurisdiction the involvement must be direct and substantial.[51]

[18, 19] In considering whether a particular activity has a direct and substantial effect upon interstate commerce the essence or nature of the activity is a factor to be considered. *See* Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 343 (9 Cir. 1969); Lawson v. Woodmere, Inc., 217 F.2d 148, 151 (4 Cir. 1954). Previously, the practice of law has been considered an intrastate activity. *See* Mutual Life Insurance Co. v. Liebing, 259 U.S. 209, 42 S.Ct. 467, 66 L.Ed. 900 (1922) (dictum). Some aspects of the practice of law are uniquely intrastate.[52] The act of the borrower in securing purchase-money from an out-of-state lender makes neither the selling of the house[53] nor the supplying of incidental legal services an interstate activity. "That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it." Wickard v. Filburn, 317 U.S. 111, 124, 63 S.Ct. 82, 39, 87 L.Ed. 122 (1942).

46. In enacting the Sherman Act "Congress exercised 'all the power it possessed.'" Apex Hosiery Co. v. Leader, 310 U.S. 469, 495, 60 S.Ct. 982, 993, 84 L.Ed. 1311 (1940). Thus, in construing the jurisdictional provisions of the Act we look to the commerce clause for guidance. United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 297-298, 65 S.Ct. 661, 89 L.Ed. 951 (1945).

47. 333 F.Supp. at 494.

48. Hotel Phillips, Inc. v. Journeymen Barbers, Hairdressers, Cosmetologists & Proprietors Int'l Union of Amer., 195 F.Supp. 664 (W.D.Mo.1961).

49. The fact that some of plaintiff's patients might travel in interstate commerce does not alter the local character of plaintiff's hospital. If the converse were true, every country store that obtains its goods from or serves customers residing outside the state would be selling in interstate commerce. Uniformly, the courts have held to the contrary.
Elizabeth Hospital, Inc. v. Richardson, 269 F.2d 167, 170 (8 Cir. 1959); *accord*, Spears Free Clinic & Hospital For Poor Children v. Cleere, 197 F.2d 125 (10 Cir. 1952); Kallen v. Nexus Corp., 353 F.Supp. 33 (N.D.Ill. 1973).

50. Neither the facts in this case nor any other authority known, supports the theory here advanced, namely, that local activities are illegal under the Sherman Act because they concern persons who have previously moved in interstate commerce or who, after receiving a local personal service, may thereafter move in interstate commerce.
Hotel Phillips, Inc. v. Journeymen Barbers, Hairdressers, Cosmetologists & Proprietors Int'l Union of Amer., 195 F.Supp. 664, 669 (W.D.Mo.1961).
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed. 2d 258 (1964), is not to the contrary, for there the plaintiff was utilizing a service in the course of his interstate travel and that service was shown to be dedicated to and an integral part of the interstate transportation of persons.

51. However, despite the increased thrust of federal commerce power as business operations become more interrelated and complex, the courts have consistently required that in order for federal antitrust jurisdiction to be sustained the effect on interstate commerce of an alleged antitrust violation in a local area must be direct and substantial, and not merely inconsequential, remote or fortuitous.
Page v. Work, 290 F.2d 323, 332 (9 Cir. 1961), cert. denied 368 U.S. 875, 82 S.Ct. 121, 7 L.Ed.2d 76 (1961).

52. We can find no logic which would support the position that the defense of a state criminal prosecution, or the trial of a divorce case would fall within the scope of interstate commerce. These activities are covered by the minimum fee schedule and the plaintiffs insist on appeal that we consider the entire fee schedule as an integral unit. We agree that the schedule is an integral unit and that real estate services are not the type of unique services whose exclusive dedication to interstate commerce requires separate consideration. *See* United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).

53. *Cf.* Marston v. Ann Arbor Property Managers (Management) Ass'n, 422 F.2d 836 (6 Cir. 1970). The Sixth Circuit in *Marston* affirmed the holding by the district judge that the rental of real estate in the Ann Arbor area "is local commerce" and that the competition restrained by the alleged price fixing agreement "is local in nature." Hence the action was dismissed for failure to sufficiently plead jurisdiction essential to a Sherman Act case.

[20] An activity which is part of a "general local service" is less likely to be subject to the Sherman Act than is an activity which constitutes an "integral part" of interstate commerce. United States v. Yellow Cab Co., 332 U.S. 218, 233, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947). The evidence in the record in this case demonstrates that the members of the Association were engaged in the general practice of law and did not solicit out-of-state business. It is merely a fortuitous circumstance that the Goldfarbs, who were residents of Virginia, intended to utilize these legal services to secure a loan from a company engaged in interstate transactions. Where the impact of the disputed trade practice upon interstate commerce is "merely incidental to defendants' local activities" no jurisdiction exists under the Sherman Act. Kallen v. Nexus Corporation, 353 F. Supp. 33, 36 (N.D.Ill.1973). We are constrained to hold that the Association sought to regulate only "general local services." The fact that those services are occasionally used by persons who are simultaneously engaged in an ancillary interstate transaction to facilitate the conduct of that transaction is merely "incidental"; this does not justify federal regulation of competitive restraints upon a business which is "wholly local" in character. Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 343 (9 Cir. 1969).[34]

Plaintiffs have drawn our attention to numerous cases which have adopted expansive concepts of federal power and argue by analogy that the impact of the alleged restraint upon interstate commerce is no more remote here than in those cases. We have previously analyzed many of those cases in Lawson v. Woodmere, Inc., 217 F.2d 148 (4 Cir. 1954), and in Savon Gas Stations Number Six, Inc. v. Shell Oil Co., 309 F.2d 306 (4 Cir. 1962), and will not repeat what we said there. We do, however, find it persuasive that no case has been called to our attention or disclosed by our independent research where an attempt to regulate those who provide a local service which is not dedicated to interstate commerce was held subject to the Sherman Act because of the fortuitous circumstance that the consumer or recipient of that service utilized it in the course of transacting interstate business.[35] The line has been drawn far short of this.[36] We decline the invitation to announce a doctrine which

34. We recognize that our conclusion that no federal jurisdiction exists with respect to the Association under the Sherman Act *may* also apply to the State Bar. However, since the district court has found, upon a valid ground, that the State Bar is not liable we have chosen to affirm the decision of the court in that respect for the reasons cited by it.

35. [T]here is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states. . . . [T]his Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce."

United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 297, 65 S.Ct. 661, 663, 89 L.Ed. 951 (1945).

36. We do not pretend to state precisely where that line has been drawn. Lawson v. Woodmere, Inc., 217 F.2d 148 (4 Cir. 1954), is the leading case in this Circuit as to what constitutes a direct and substantial burden on interstate commerce. Although analogies in such matters are seldom helpful we find the remoteness in the instant case far greater than that in *Lawson* where this court found that no jurisdiction existed.

With respect to the remoteness issue, this case can be compared to Gordon v. Illinois Bell Telephone Co., 339 F.2d 103 (7 Cir. 1964). There the plaintiff was engaged in the business of providing a telephone answering service for businesses, many of which were engaged in interstate commerce. The defendant, a local telephone company, allegedly discontinued a particular switchboard operation to drive the plaintiff out of business. Plaintiff brought an action for treble damages under the Sherman Act. In affirming dismissal of the action on appeal the court said the fact that "a few of plaintiffs' customers are engaged in interstate commerce is too unrelated a factor to impress plaintiffs' operation with an interstate character within the meaning and ambit of the Sherman Act." *Id.* at 106.

would sweep away the concept of remoteness, a concept which has historically limited federal power over commerce.

IV. Judicial Legislation

In recent times an unusually large number of noteworthy articles have appeared in legal periodicals discussing the merits and demerits of minimum fee schedules.[37] Those articles undertake to demonstrate that better methods are available to secure the objectives sought by minimum fee schedules; indeed, they have served to call to our attention logical and persuasive reasons for abandoning fee schedules. We do not doubt that they present cogent arguments for consideration by a legislature or bar association. However, we do not find such considerations controlling in a judicial setting. "These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy." Northern Securities Co. v. United States, 193 U.S. 197, 352, 24 S.Ct. 436, 463, 48 L.Ed. 670 (1904); quoted with approval in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 at 562, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

[21] We sit as a court of law. The question before us is whether the defendants' fee schedule system restrains trade or commerce in violation of the Sherman Act. While some of the cases cited and discussed herein demonstrate that traditionally the Sherman Act was not believed to cover the activities involved here, the Goldfarbs urge us to depart from that line of cases. They insist that we look to economic realities and adapt the broad language of the Sherman Act to the evolution of modern commercial practice. The answer to that is "it is not for the courts to indulge in the business of policy-making in the field of antitrust legislation." United States v. Cooper Corporation, 312 U.S. 600, 606, 61 S.Ct. 742, 744, 85 L.Ed. 1071 (1941). The Goldfarbs also ignore the restrictions of the commerce clause which are not to be disregarded by this court.

In effect, what the Goldfarbs urge upon us is judicial legislation. This is an area in which such legislation would be most inappropriate. To hold that the practice of law is subject to the Sherman Act would cast doubt upon the validity of bar admission standards, prohibitions upon advertising, and a multitude of other restrictions upon the practice of law. In our governmental system a legislative body is better equipped to accommodate these restrictions imposed upon the practice of a profession to the overall design and purpose of the antitrust laws.

Furthermore, antitrust laws are *punitive* as well as remedial. Any action on this subject matter by a legislative body will clearly be prospective. The ramifications of a judicially initiated extension of the coverage of the Sherman Act is less certain. The potential of the retroactive application of such a judicial extension coupled with the doubt it would cast upon the continuing viability of other ethical restrictions would create confusion in a profession where order is essential.

Our concern over retroactive application of this punitive statute does not end there. Even the most astute lawyer who

37. *E. g.*, Arnould & Corley, Fee Schedules Should be Abolished, 57 A.B.A.J. 655 (1971); Morgan, Where Do We Go from Here with Fee Schedules, 59 A.B.A.J. 1403 (1973); Minimum Fee Schedules as Price Fixing: A Per Se Violation of The Sherman Act, 22 Am.Univ.L.Rev. 439 (1973); The Antitrust Division v. The Professions—"No Hobbling" Clauses And Fee Schedules, 48 Notre Dame Lawyer 966 (1973); The Wisconsin Minimum Fee Schedule: A Problem of Antitrust, 1968 Wisc.L.Rev. 1237 (1968); *see also* The Learned Professions, 33 A.B.A. Antitrust L.J. 48.

could foresee judicial legislation extending the coverage of the Sherman Act to his profession would have been on the horns of a dilemma: if he followed the minimum fee schedule he *could* be violating the Sherman Act; if he did *not* follow it he *would* be in violation of the Virginia Code of Professional Responsibility. It would be an illusory choice since either action might result in punishment. The law does not compel this harsh result.

For the reasons stated we conclude that neither the Virginia State Bar nor the Fairfax County Bar Association has violated the Sherman Antitrust Act. The judgment of the district court is affirmed with respect to the Virginia State Bar and is reversed and vacated with respect to the Fairfax County Bar Association.

Affirmed as to No. 73-1247; reversed as to No. 73-1248.

CRAVEN, Circuit Judge (concurring and dissenting):

I would affirm the judgment of the district court both in holding the Fairfax County Bar Association liable for violating section 1 of the Sherman Act, 15 U.S.C. § 1, and in exonerating the Virginia State Bar. Thus I concur in the result the majority reaches as to the State Bar, and dissent as to Fairfax County Bar Association.

I take it, as I read the majority opinion, that we all agree that Judge Bryan correctly stated the rule of the Sherman Act, were it to govern this case.

> Minimum fee schedules are a form of price fixing and therefore inconsistent with antitrust statutes prohibiting anti-competitive activities.
>
> "Price fixing is per se an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve." United States v. Real Estate Boards, 339 U.S. 485, 489, 70 S.Ct. 711, 714, 94 L.Ed. 1007 (1950).

355 F.Supp. at 493. The majority has concluded, however, that the Sherman Act applies to neither the State Bar nor Fairfax.

They say that the Virginia State Bar may lawfully fix prices for legal services —not because it is a sufficiently independent regulatory agency to come within the *Parker* exemption [1]—but because it is "actively supervised" by the Supreme Court of Virginia. Majority opinion at 11. In so holding, the majority relies upon a stipulation that was not adopted by the district judge:

> 16. The Virginia Statutes have given the Supreme Court of Virginia authority to make questions involving suggested fee schedules and economic reports of the State Bar and of Local Bar Associations questions of ethics under the laws of Virginia.

In refusing the stipulation, the district court expressly noted that it was a conclusion of law rather than a fact. 355 F.Supp. at 492 n. 2.[2] He also intimated

1. Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

2. The statute that is claimed to give the Supreme Court authority to prescribe fee schedules does not mention fees at all.

> The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:
>
> (a) Defining the practice of law.
>
> (b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law including the practice of law or patent law through professional law corporations, professional associations and partnerships, and a code of judicial ethics.
>
> (c) Prescribing procedure for disciplining, suspending, and disbarring attorneys-at-law.
>
> Va.Code § 54-48 (as amended 1973).
>
> The court's authority is further circumscribed by § 54-51:
>
> Notwithstanding the foregoing provisions of this article, the Supreme Court of Appeals shall not adopt or promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys at law, which shall be inconsistent with any statute . . . .
>
> Va.Code § 54-51.

that he had some difficulty seeing what, if anything, a minimum fee schedule has to do with ethics. *Id.* at 496 n. 4. These questions and others like them can best be left to the Supreme Court of Virginia. Whatever that court may think of the power claimed for it to equate price fixing with legal ethics, I think it will be surprised to learn that it is engaged in *active* supervision of the State Bar's implementation of minimum fee schedules in Virginia. I find nothing in the record to suggest that the Virginia court even knew that Fairfax County Bar Association had a minimum fee schedule, or that it approved it either directly or indirectly through the State Bar.

I would exonerate the State Bar not because it falls within the *Parker* exemption but for the second reason advanced by the district judge: the exceedingly "minor role" of the State Bar in this matter. He found that the State Bar did not promulgate the minimum fee schedule, did not endorse or approve it, never undertook to discipline any attorney for violating it, and never contemplated any such action. All the State Bar ever did, apparently, was to suggest that local associations might wish to adopt a minimum fee schedule and to circulate reports on the schedules that local bar associations had adopted. Such minimal participation seems to me insufficient to impose Sherman Act liability upon the State Bar. *See* United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 494-496, 70 S.Ct. 711, 94 L.Ed. 1007 (1950).

As to Fairfax County Bar Association, I am in complete agreement with the majority that the local association cannot and does not qualify for the *Parker* exemption. Nevertheless they exonerate Fairfax on two grounds: (1) that the practice of law is a learned profession rather than a trade or business, and that lawyers are thus exempt from the Sherman Act's prohibition of price fixing; and (2) that the practice of law in Fairfax County, and more especially the investigation and certification of land titles in that county, do not sufficiently affect interstate commerce to invoke the Sherman Act.

If the majority is correct that interstate commerce is not sufficiently affected, that is the end of the matter and there is no occasion or necessity to apply the *Parker* exemption to exonerate the State Bar and the so-called learned profession exemption to exonerate Fairfax. I believe, however, that Fairfax County minimum fees have a sufficient impact on interstate commerce. The applicable standard was stated succinctly in Burke v. Ford, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967):

> [I]t is well established that an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce.

Id. at 321 (emphasis in original).

The district court found as a fact that a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from outside the State of Virginia. His finding is supported by substantial evidence. One sample taken from the Office of Recorder of Deeds of Fairfax County indicated that $75,000,000 out of $136,000,000 loaned for mortgages was loaned by persons or corporations residing outside or incorporated outside of Virginia. During 1968-72 more than $570,000,000 of loans was either guaranteed by the United States Veterans Administration or insured by the United States Department of Housing and Urban Development, both of which are headquartered in the District of Columbia. In addition to the interstate commerce in loans, there was evidence tending to show substantial interstate movement and travel of persons into northern Virginia. Indeed, the evi-

dence tended to show that more than 30 percent of the population of Arlington County, Fairfax County, and the city of Alexandria in 1970 had come from areas outside Virginia since the year 1965. The district judge accepted "uncontradicted evidence" that a large percentage of persons who live in Fairfax County work outside of Virginia. We may judicially notice, I think, that Fairfax County is one of Washington's bedrooms. The cumulation of these facts persuades me that housing in Fairfax County is a commodity offered for sale in interstate commerce. It cannot realistically be considered a purely local market.

The evidence also demonstrates that the minimum fee schedules affect the cost of housing in Fairfax County. The district court found that all or nearly all money lenders require title examination and title insurance. Title search fees thus become a part of the cost of housing. The price that thousands of employees in the District of Columbia have to pay for housing in Fairfax County, Virginia, has, it seems to me, a direct, immediate, and substantial effect on interstate commerce. It is irrelevant that the restraint occurs only in Fairfax County. I would have thought it beyond question that the Sherman Act encompasses local restraints that directly affect the cost of a commodity offered for sale in interstate commerce. This was the thrust of the holding in Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948), where the Court said:

> [T]he inquiry whether the restraint occurs in one phase or other, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented.

Id. at 234. In United States v. Women's Sportswear Manufacturers Ass'n, 336 U.S. 460, 464, 69 S.Ct. 714, 1005, 93 L. Ed. 805 (1949), Mr. Justice Jackson, writing for the Court, stated:

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

I believe the district court's findings of fact are not clearly erroneous and compel the conclusion that an agreement to fix fees that infect the cost of housing in Fairfax County has a sufficient impact on interstate commerce to come within the Sherman Act. The Supreme Court has said that "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.'" United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298, 65 S.Ct. 661, 664, 89 L.Ed. 951 (1945). I believe it is much too late to dismiss as "expansive concepts of federal power" an interpretation of the commerce clause that would embrace the fee schedules involved here. Since the modern era of the commerce clause began in 1937 with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed.2d 893 (1937),[3] the Supreme Court has consistently approved congressional regulation of local activities that have a potential for affecting interstate commerce.[4] Our

3. The 1937 change of direction was so significant that casebooks now divide study of the commerce power into two parts: before and after 1937. *See, e. g.*, G. Gunther & N. Dowling, Constitutional Law § 5: "The Commerce Power Since 1937—Constitutional Revolution or Continuity?" (8th ed. 1970); W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law § 3: "Evolution of National Power Over National Economic Problems: I. Limitations on Federal Power Through 1936: II. Expansion of Federal Power After 1936" (3d ed. 1970).

4. The recent history of the commerce clause is surveyed in Perez v. United States, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971).

interpretation of the Sherman Act should keep pace with these decisions. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 557, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

Nor can I accede to the view that the legal profession is exempt from the Sherman Act. The majority states that two cases decided by the United States Supreme Court hold "that one engaged in the practice of a profession 'follow[s] a profession and not a trade.'" Majority opinion at 13. They are mistaken. The Supreme Court has never so held and indeed has refused to "intimate an opinion on the correctness of the application of the term [trade] to the professions." United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 491–492, 70 S.Ct. 711, 715, 94 L.Ed. 1007 (1950); American Medical Ass'n v. United States, 317 U.S. 519, 528, 63 S.Ct. 326, 87 L.Ed. 434 (1943). Nor has any inferior federal court ever so held.[5] Nothing supports the so-called "learned profession" exemption except dicta from cases decided in an era of judicial antagonism to governmental regulation of business and commerce. FTC v. Raladam Co., 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324 (1931), involved the Federal Trade Commission's efforts to regulate the manufacturer and seller of an obesity cure. It had nothing to do with any learned profession, but Mr. Justice Sutherland included in his opinion the dictum that medical practitioners "follow a profession and not a trade . . . ." *Id.* at 653.

The other case said to be the source of the "learned profession" exemption is Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922). In the course of deciding that the Sherman Act did not apply to organized baseball, Mr. Justice Holmes found occasion to state that not only is baseball not "trade or commerce in the commonly accepted use of those words," but that any "personal effort, not related to production, is not a subject of commerce."[6] He then repeated illustrations given by the court below:

> [A] firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

Id. at 209.

The last and final support for the so-called "learned profession" exemption is found in a 1932 opinion by Mr. Justice Sutherland who quotes with approval from an opinion by Mr. Justice Story, as set out in the majority opinion at footnote 35. Not only was the reference to learned professions irrelevant to the decision in the case, but it is clear from the context that Justice Story's language was used to broaden rather than constrict the definition of the word "trade."

5. The opinion that medicine was not a trade was the basis for the district court decision in the AMA case, but the court of appeals reversed on the issue, and the Supreme Court avoided it on the second appeal of the case. United States v. American Medical Ass'n, 28 F.Supp. 752 (D.D.C.1939), rev'd, 72 App.D.C. 12, 110 F.2d 703, cert. denied 310 U.S. 644, 60 S.Ct. 1006, 84 L.Ed. 1411 (1940); United States v. American Medical Ass'n, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (1943). The only other holding that even remotely resembles a "learned profession" exemption is Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 139 U.S. App.D.C. 217, 432 F.2d 650, cert. denied, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1970), and the court there was careful to note that it was not creating a wide-ranging exemption for college accreditation associations. Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957), included a statement that the practice of medicine is neither trade nor commerce, but the decision of the court rested on several other grounds, including the absence of any connection with interstate commerce and the failure to allege monopolization or injury to the public.

6. 259 U.S. at 209. This broad declaration has been rejected by subsequent cases that have applied the Sherman Act to personal services. *See* United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 489–492, 70 S.Ct. 711, 94 L.Ed. 1007 (1950).

Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 52 S.Ct. 607, 76 L.Ed. 1204 (1932).

Upon these three dicta the majority erect the "learned profession" exemption from the Sherman Act. I am respectfully of the opinion that there is no such exemption and that none was ever intended by the Congress. One of the slender supports upon which the doctrine is said to rest has itself been destroyed by the Supreme Court. In Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957), the Supreme Court had occasion to reexamine Mr. Justice Holmes' opinion in *Federal Baseball*. In refusing to extend the baseball umbrella to cover football, Mr. Justice Clark explained that the Court had adhered to the baseball exemption from the Sherman Act "because it . . . . concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity." *Id.* at 450. In virtually conceding that it is nonsense to have baseball outside the Sherman Act and football within it, Mr. Justice Clark noted, "were we considering the question of baseball for the first time upon a clean slate we would have no doubts." *Id.* at 452.[7]

The Court's repudiation of the rationale for *Federal Baseball* and its twice-repeated refusal to express any opinion on the learned professions leave the claimed exemption without any affirmative support in Supreme Court cases. I do not find the dicta from another era persuasive, much less compelling, and I am unable to perceive any reason why lawyers should be free to fix prices when carpenters cannot. In the opinion below, Judge Bryan said:

> The scope of the statutory language in the Sherman Act is so expansive that courts have been reluctant to find exceptions. The language explicitly states that "*every* contract, combination or conspiracy which restrains commerce among several states is unlawful." (Emphasis supplied.) Illustrative of this reluctance is the refusal to extend baseball's exempt status to other professional sports . . . . The fact that specific exemptions are clearly delineated suggests that ambiguities should be resolved in favor of inclusion. This is especially true where price-fixing is involved since it has been declared both pernicious and lacking in any redeeming social value.

355 F.Supp. at 493 [citations omitted]. I agree with his analysis. I do not think this court should create another exemption that will almost certainly lead to the same problems that *Federal Baseball* has given the Supreme Court. Members of other "learned professions" will no doubt seek the same exemption, and the label will be of little help in deciding whether to sanction price fixing by architects, marriage counselors, dentists, and other groups that operate under ethical standards.

> [A]rticulating the reasons lawyers need a fee schedule, as distinguished from other groups which perform public services, might present some embarrassing difficulties and lead the courts into a quagmire in determining the relative societal importance of all groups seeking exemption.

Note, The Wisconsin Minimum Fee Schedule: A Problem of Antitrust, 1968 Wisconsin L.Rev. 1237, 1257 (footnotes omitted).

Although the practice of law is a learned profession, it is pursued for the purpose (among others) of earning a living. To that extent I think it falls within the strictures of the Sherman Act, and I would affirm the decision below.

7. Organized football was not the first enterprise to seek an antitrust exemption under *Federal Baseball*. The Supreme Court had earlier rejected the pleas of organized boxing and the theater. United States v. International Boxing Club, Inc., 348 U.S. 236, 75 S.Ct. 259, 99 L.Ed. 290 (1955); United States v. Shubert, 348 U.S. 222, 75 S.Ct. 277, 99 L.Ed. 279 (1955).

APPENDIX C

JUDGMENT

United States Court of Appeals

for the

Fourth Circuit

No. 73-1247

Lewis H. Goldfarb, and
Ruth S. Goldfarb,

Appellants,

vs.

Virginia State Bar and
Fairfax County Bar Association,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

[Filed, May 8, 1974
William K. Slate, II
Clerk]

/s/ William K. Slate II
CLERK

[CERTIFICATE]

JUDGMENT

United States Court of Appeals

for the

Fourth Circuit

No. 73-1248

Lewis H. Goldfarb and
Ruth S. Goldfarb,

Appellees,

v.

Fairfax County Bar Association,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed and vacated.

[Filed May 8, 1974
William K. Slate, II
Clerk]

/s/ William K. Slate II
CLERK

[CERTIFICATE]

Supreme Court, U. S.
FILED
OCT

No. 74-70

In the Supreme Court of the United States

OCTOBER TERM, 1974

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
PETITIONERS

v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
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v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether a minimum fixed fee schedule promulgated by a county bar association is exempt from the Sherman Act's prohibition against price fixing on the ground that the restraint on competition is among the members of a "learned profession."

2. Whether interstate commerce is affected by collectively-fixed fees for attorneys' services in connection with the purchase of real estate in Northern Virginia.

3. Whether the Virginia State Bar is exempt from liability under the Sherman Act for its role in the

establishment and enforcement of minimum fee schedules under the "state action" doctrine of *Parker* v. *Brown,* 317 U.S. 341

4. Whether the Eleventh Amendment immunizes the State Bar from suit in a federal court.

INTEREST OF THE UNITED STATES

Responding to evidence that prices for personal services were increasing more rapidly than the rate of inflation in the rest of the economy, more than four years ago the United States initiated a concerted program of antitrust enforcement directed at the "commercial" aspects of various professions (including attorneys) and other providers of personal services.[1] This program has included widely-disseminated statements of the Antitrust Division's policies, followed by litigation challenging particular anticompetitive fee-setting practices of various professions. The government has challenged minimum fixed fee schedules of professional associations of engineers, architects, accountants and realtors as illegal price fixing.[2] Earlier this year the government filed a simi-

[1] See, *e.g.*, McLaren, *Antitrust—The Year Past and The Year Ahead*, 1970 N.Y. State Bar Ass'n Antitrust L. Symp. 15, 23 McLaren, *Interview*, 39 Antitrust L.J. 368, 377 (1970); Hearings before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, on Legal Fees, 93d Cong., 1st Sess., pt. I, pp. 164–185.

[2] *E.g.*, *United States* v. *Prince Georges County Bd. of Realtors*, Civ. No. 21545 (D. Md.), terminated by consent decree on December 28, 1970; *United States* v. *American Soc'y of Civil Eng'rs*, Civ. No. 72 C 1776 (S.D.N.Y.), terminated by consent decree on June 1, 1972; *United States* v. *American Institute of Architects*, Civ. No. 992–72 (D.D.C.), terminated by consent decree on June 19, 1972; *United States* v. *American Institute of Certified Public Accountants, Inc.*, Civ. No. 1091–72 (D. D.C.), terminated by consent decree on July 6, 1972; *United States.* v. *National Soc'y of Professional Eng'rs*, Civ. No. 2412–72 (D.D.C.), pending after trial.

lar action challenging a bar association's minimum fee schedule.[3]

Despite the government's enforcement efforts,[4] bar association minimum fixed fee schedules, a fairly recent development,[5] are still widespread; they have been used in as many as 34 states (Pet. App. A 20). The decision of the court of appeals that such schedules do not violate Section 1 of the Sherman Act, if left standing, will diminish the incentive for state and local bar organizations to reconsider their maintenance of such schedules; other professions also may conclude that they, too, are under no legal compulsion to eliminate these means of fixing prices.

The interest of the United States in this case is underscored by the President's recent announcement of his economic program, in which he referred to the

[3] *United States* v. *Oregon State Bar*, No. 74–362 (D. Ore.), filed May 9, 1974, pending on defendant's motion for summary judgment, raising the "learned profession" and "state action" claims discussed *infra*, pp. 5–8, 9–10, but not the "commerce" issue (see pp. 8–9, *infra*).

[4] The American Bar Association, which in 1961 endorsed minimum fee schedules by concluding that the habitual charging of fees less than those established by such a schedule may be evidence of unethical conduct (Opinion No. 302, Committee on Professional Ethics and Grievances), stated in 1970 that "[m]ere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action" (Opinion No. 323, Committee on Ethics and Professional Responsibility).

[5] See Branca, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Act Exemption That Doesn't Exist*, 3 U.C.L.A.-Alaska L. Rev. 207, 208 (1974).

need for enforcement of the antitrust laws with respect to "noncompetitive professional fee schedules and real estate settlement fees * * *." 120 Cong. Rec. H10120, H10121 (daily ed., October 8, 1974).

STATEMENT

Petitioners filed a class action against respondents Virginia State Bar and Fairfax County Bar Association alleging that respondents' adoption and enforcement of a minimum fixed fee schedule for attorneys constituted price fixing and restraint of trade and commerce, in violation of Section 1 of the Sherman Act. Petitioners claimed to represent a class consisting of all persons who, as petitioners did, had purchased homes in Reston, Virginia, during the four years preceding the filing of the complaint and who had been charged title examination fees by attorneys in accordance with that schedule. Petitioners sought damages, a declaratory judgment and an injunction.

The district court severed the issue of damages and, after trial of liability, held that the Association's adoption and use of the schedules violated the Sherman Act. It dismissed the case against the State Bar on the ground that its challenged activities (unlike the Association's) were covered by the implied exemption from the Act for "state action" recognized in *Parker* v. *Brown,* 317 U.S. 341 (Pet. App. A; 355 F. Supp. 491).

The court of appeals affirmed as to the State Bar but reversed as to the Association, Judge Craven dissenting in part (Pet. App. B; 497 F. 2d 1). The court held that the setting of minimum fees by attorneys

was covered by an implied exemption from the Sherman Act for "learned professions," and that the Association's activities with respect to the fee schedule involved "local service" that did not affect interstate commerce. The court agreed with the district court that the State Bar was immune under *Parker* v. *Brown.*

Judge Craven would have affirmed the dismissal of the State Bar on the ground that its involvement in promulgating and maintaining the fee schedules was too insubstantial to render it liable for violation of the Act. He concluded, however, that there is no exemption from the Sherman Act for "learned professions," and that the activities of the Association with respect to the fee schedule sufficiently affected commerce to be within the Sherman Act.

DISCUSSION

1. The principal question in this case—whether the Sherman Act applies to minimum fee schedules promulgated and maintained by bar associations—is an important issue under the antitrust laws that this Court has not decided but should resolve. As the dissenting opinion of Judge Craven in the court of appeals demonstrates, the rationale of a long line of decisions applying the Sherman Act to the provision of various personal services indicates that the commercial aspects of the practice of law are not exempt from the prohibitions of Section 1 of the Sherman Act against unreasonable restraints of trade.

The importance of the issue is manifest. The types of legal services to which minimum fee schedules nor-

mally apply—real estate transactions, drafting of legal instruments, divorce proceedings, probate work, *etc.*—affect a large number of people. Although the total charges for those services cannot be estimated, they obviously amount to many millions of dollars. Lawyers, bar associations and clients should know whether the antitrust laws bar such fixing of minimum fees.

This Court has never held that there is an implied exemption from the Sherman Act for the learned professions. It specifically found it unnecessary to decide in *American Medical Association* v. *United States,* 317 U.S. 519, 528, "whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act," and in *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485, 491–492, declined to "intimate an opinion" on whether the "professions" constitute "trade" under the Sherman Act. The reasoning of this Court's decisions applying the Sherman Act in a variety of contexts, however, indicates that it does cover the fixing of fees for legal services by bar associations—the most commercial aspect of law practice.

The words "restraint of trade" in the Sherman Act broadly cover "[t]he fixing of prices and other unreasonable restraints" not only with respect to goods but with respect to services, including personal services. *Id.* at 491, and cases there cited. There is no sound reason why the pricing of legal services, like the pricing of other personal services, should not also be subject to the Sherman Act's prohibition of unreasonable restraints of trade.

As this Court recently recognized, "[w]e live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise." *Fuller* v. *Oregon,* No. 73–5280, decided May 20, 1974, slip op. p. 13. Insofar as compensated services are concerned, the lawyer has been described as "a self-employed business man." Patterson & Cheatham, *The Profession of Law* 263 (1971).[6]

Application of the Sherman Act to the fee-setting practices of the legal profession will not, as the court of appeals feared, weaken standards for admission to the bar and undermine the ethical standards of the profession. The only question is whether the antitrust laws apply to the most commercial aspects of legal practice—the fixing of minimum fees. Whatever may be the appropriateness of modifying traditional criteria in applying the Sherman Act to a profession

[6] The cases upon which the court of appeals relied in holding that there is an implied exemption from the Sherman Act for the learned professions do not support that conclusion. The statement in *Federal Baseball Club of Baltimore, Inc.* v. *National League*, 259 U.S. 200, 209, that "personal effort, not related to production, is not a subject of commerce," is no longer viable in view of the discrediting of the holding in that case that professional baseball is not commerce under the Sherman Act—a holding this Court characterized as an "aberration" which has survived only because of *stare decisis. Flood* v. *Kuhn*, 407 U.S. 258, 282. Similarly, Justice Story's 1834 dictum in *The Nymph*, 18 Fed. Cases 506, 507 (C.C. D.Me.), distinguishing between a trade that "is carried on for the purpose of profit, or gain, or livelihood" and "the liberal arts or the learned professions," provides no meaningful guideline for determining today whether the Sherman Act covers the commercial aspects of the practice of law.

(see *United States* v. *Oregon State Medical Soc'y*, 343 U.S. 326, 336), there is no occasion to do so when dealing with the fixing of the charges its members impose for their services.

2. The court of appeals also erred in concluding that the fee fixing involved merely a "local service" that did not affect interstate commerce.

The district court's findings establish that the application of minimum fixed fee schedules to real estate transactions in northern Virginia had a substantial effect on interstate commerce. The court found that "a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia" (Pet. App. A 4); that almost half of the recorded Fairfax County deeds of trust of under $100,000 that identify the location of the mortgagee show the mortgagee to be located outside the state (*id.* at A 7); that almost all lenders making mortgage loans require title insurance and a title examination (*id.* at A 4); and that these facts showed that respondents' minimum fixed fee schedule for title examinations and for the preparation of title insurance papers by attorneys in Virginia substantially affected interstate commerce (*ibid.*). In addition, the court found that a substantial percentage of Fairfax County residents work outside of Virginia (*ibid.*), that a significant amount of loans on Fairfax County real estate are guaranteed by government agencies with headquarters in the District of Columbia (*ibid.*), and that more than 31 percent of the persons who lived in Fairfax County in 1970 had lived outside of Virginia in 1965 (*id.* at A 6).

This Court has repeatedly recognized that the Sherman Act applies to local activities that substantially affect interstate commerce. See, *e.g.*, *Burke* v. *Ford*, 389 U.S. 320, 321; *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186, 189; *United States* v. *Women's Sportwear Mfrs. Ass'n*, 336 U.S. 460, 464; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234. The district court's findings, which the court of appeals did not reject, show that the fee fixing by the local bar association had a significant impact upon interstate commerce and, under this Court's decisions, is therefore subject to Section 1 of the Sherman Act. In addition, since few out-of-state lenders are likely to finance real estate transactions in Fairfax without availing themselves of the safeguards provided there by the services of an attorney, those services play an integral role in the interstate financing of such transactions.

3. Finally, the court of appeals erred in concluding that the actions of the State Bar in proposing minimum fixed fee schedules and threatening to enforce them were within the implied exemption from the Sherman Act for "state action" recognized in *Parker* v. *Brown*, *supra*, 317 U.S. at 350–352 (Pet. App. B4–B12). Under that doctrine, restraints of trade do not violate the Sherman Act where they derive their "authority and * * * efficacy from the legislative command of the state" (317 U.S. at 350), involve activities of a state or its officers or agents "directed by its legislature" (*id.* at 350–351), and are adopted, approved and enforced by the state or a state agency.

Id. at 352. Accord, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 706–707.

The fee schedules here were not required by any legislative command of the state, and were not adopted, specifically approved, or directly enforced by the Supreme Court of Virginia, the only arguably relevant state agency.[7] The fact, which the court of appeals apparently held to be dispositive, that the state court has a general statutory duty to supervise the State Bar in prescribing and enforcing the court's code of ethics for attorneys, is not enough to bring the State Bar within the "state action" exemption. The theory of the "state action" exemption is that action taken pursuant to governmental direction is not intended to be prohibited by the Sherman Act. For the principle to apply, however, the state must be more than peripherally involved. See, *e.g., George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25, 30 (C.A. 1), certiorari denied, 400 U.S. 850; *Hecht* v. *Pro-Football, Inc.*, 444 F. 2d 931, 935 (C.A.D.C.), certiorari denied, 404 U.S. 1047. The Supreme Court of Virigina is not directly enough involved in the promulgation and maintenance of the

[7] Under Virginia law the State Bar is an association composed of the attorneys of the State (Va. Code 54–49); its officers must be active practitioners, most of whom practice privately; and it is controlled by a Council of elected and appointed attorneys (Pet. App. B 11). Accordingly, the court of appeals correctly recognized (Pet App. B 11) that the State Bar itself, consisting of those subject to regulation, had insufficient independence to be regarded as a state agency under the "state action" doctrine. See *Asherville Tobacco Bd. of Trade, Inc.* v. *Federal Trade Commission*, 263 F. 2d 502, 508–510 (C.A. 4); cf. *Gibson* v. *Berryhill*, 411 U.S. 564, 578–579.

local association's minimum fee schedules to bring the State Bar within the "state action" exemption of *Parker* v. *Brown*.

Since the State Bar is not the *alter ego* of the State of Virginia, nor a state agency in any relevant sense (see p. 10, *supra*, n. 7), a judgment against the State Bar, even for money damages, would not be equivalent to a judgment against the state.[8] Accordingly, the Eleventh Amendment does not immunize the State Bar from suit against it in the federal courts. See generally *Edelman* v. *Jordan*, 415 U.S. 651.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
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OCTOBER 1974.

[8] A State Bar Fund, derived from fees from members of the State Bar, is maintained only for use by the State Bar. Va. Code 54–52.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia, Homeowners,

Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

MOTION FOR LEAVE TO FILE AND BRIEF OF CLARK C. HAVIGHURST, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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September 23, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia, Homeowners,

Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF CLARK C. HAVIGHURST, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The undersigned applicant, Clark C. Havighurst, respectfully moves this honorable Court for leave to file the annexed brief *amicus curiae* in support of the petition for a writ of certiorari in this case.

1. Applicant is a professor of law at Duke University, teaching courses in antitrust law and public regulation of business as well

as seminars in legal and policy issues in health care. His scholarship in recent years has focused primarily on the health care delivery system and the role of law in improving its performance. In particular, he has closely examined in his published writings both the prospects for strengthening the competitive market as an instrument of social control of the health care system and the problems presented by the alternative of more closely regulating behavior in this important industry. See, *e.g.*, "Health Maintenance Organizations and the Market for Health Services," 35 *Law & Contemp. Prob.* 716 (1970), and "Regulating Health Facilities and Services by 'Certificate of Need,'" 59 *Virginia L. Rev.* 1143 (1973).

2. This case presents this Court with an opportunity to determine the applicability of the antitrust laws to the so-called "learned professions," an issue which has never been definitively resolved. While this case presents the issue solely within the context of the legal profession, the result has important implications for other professions as well. While there is potentially much room for debate about which particular callings would qualify for the implied antitrust "exemption" recognized by the Court of Appeals, the medical profession would seem certain to be among those directly affected.

3. Applicant believes that the parties, being primarily concerned with the role of the antitrust laws in the market for legal services, are unlikely to provide the Court with an adequate sense of the importance of this case for the medical profession and for the performance of the health services industry as a whole, an industry which now consumes U.S. resources at a rate in excess of $100 billion per year. While *amicus curiae* briefs on the grant or denial of a writ of certiorari are generally not favored

by this Court, it is respectfully submitted that this Court would be materially assisted in its appraisal of the importance of this case by submissions highlighting the role of antitrust policy in professions other than the legal profession.

4. Applicant has requested consent to file a brief *amicus curiae* from the parties to this case under Rule 42 of the Rules of the Court, but as of this date the requisite consents have not been received.

Applicant therefore respectfully urges this Court to grant leave to file the annexed brief *amicus curiae* in support of the petition for a writ of certiorari in this case.

Respectfully submitted,

CLARK C. HAVIGHURST
Duke University School of Law
Durham, North Carolina 27706
Tel. (919) 684-2636
Amicus Curiae, pro se

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INTEREST OF THE AMICUS CURIAE

The undersigned, Clark C. Havighurst, respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case so that this Court may examine the implications of the decision below for the medical profession and the market for health services. The undersigned is a professor of law at Duke University, teaching antitrust law, regulated industries, and seminars on legal and policy issues in

health care. His recent research interests have largely concerned the health care delivery system and the role of law in improving its performance.

INTRODUCTION AND SUMMARY OF ARGUMENT

The majority in the Court of Appeals in this case has discovered an implied exemption from the antitrust laws which, if allowed to stand, would have grave implications for the health care delivery system. *Goldfarb v. Virginia State Bar and Fairfax Co. Bar Ass'n,* 497 F.2d 1 (4th Cir. 1974), reversing 355 F. Supp. 491 (1973). This brief argues (1) that the asserted "learned professions" exemption is without legal foundation and, moreover, would be inconsistent with basic antitrust policy in numerous respects; (2) that there is ample room under an antitrust regime for those professional activities which serve the public well; and (3) that the market for medical services features a substantial degree of monopoly power, which is perpetuated and increased by concerted activities of the medical profession and which could be moderated by intelligent application of antitrust principles. On these grounds it is submitted that a sweeping antitrust exemption for the so-called "learned professions," such as that recognized by the majority in the Court of Appeals, would be not only bad law but bad policy as well.

The antitrust laws are potentially one of society's best defenses against elitism and monopoly in medicine. Even where Congress or state legislatures find it appropriate to abridge competition in the provision of medical services, antitrust – if unhampered by a "learned professions" exemption or by unrealistic standards for assessing interstate impact – can assist the courts in harmonizing restrictive

legislation with other values of a free society. *Cf. Silver v. New York Stock Exchange,* 373 U.S. 341, 359-60 (1963). To a substantial degree, the lack of an explicitly procompetitive legal environment has contributed to many of the problems which now afflict the health care delivery system. Explicit judicial acceptance of an antitrust exemption for the medical profession would exacerbate these problems and necessitate greater public intervention in the highly private and personal business of obtaining attention to one's health needs. By the same token, clarification that antitrust policy is relevant to the marketplace for professional services of all kinds could improve the climate for needed change.

A high priority should be attached to weakening monopoly and strengthening competition in the market for health services, a market which currently consumes U.S. resources at a rate of over $100 billion a year and which features cost increases which far outstrip inflation rates in the economy as a whole. In this case, immediately involving the legal profession, this Court is presented with an occasion for action which will significantly affect, one way or the other, the performance of this important economic sector.

ARGUMENT

I

A "LEARNED PROFESSIONS" EXEMPTION SUCH AS THAT ANNOUNCED BY THE COURT OF APPEALS MAJORITY WOULD BE INCONSISTENT WITH ANTITRUST LAW AND POLICY IN NUMEROUS RESPECTS.

A. The Asserted "Learned Professions" Exemption Is Without Legal Foundation And Would Violate The Salutary Principle That Exemptions From The Antitrust Laws Are Not To Be Lightly Implied.

Judge Craven's insightful dissenting opinion in the Court of Appeals accurately notes the absence of substantial judicial support for exempting the so-called "learned professions" from the antitrust laws. 497 F.2d at 23. The asserted exemption likewise finds no support in revealing statutory language or in legislative history. It thus appears that the majority below has overridden the strong procompetitive policy of the antitrust laws without helpful precedent to guide it and with far less statutory warrant and far less critical examination of the policy issues than has ever supported recognition of any other antitrust exemption. Its decision is therefore inconsistent with the long-standing and widely approved principles which this Court has evolved for asserting the paramountcy of competition where Congress has not spoken plainly to the contrary.

The strength and broad compass of antitrust's procompetitive policy have been amply revealed in many decisions of this Court. Thus, even where Congress has expressly

created an exemption from the antitrust laws, as it did in declaring in section 6 of the Clayton Act, 15 U.S.C. §17 (1970), that "the labor of a human being is not a commodity or article of commerce," this Court has construed the exemption narrowly. For example, this Court has resisted attempts to broaden the "human labor" exemption beyond the obvious Congressional intent to allow legitimate concerted activities of labor unions and the like. *Atlantic Cleaners & Dyers, Inc v. United States*, 286 U.S. 427, 429 (1932); *United States v. Nat'l Ass'n of Real Estate Boards*, 339 U.S. 485, 489-90 (1950).

Similarly, where Congress has expressly attenuated competition and reduced reliance on market forces in a regulated industry, the consistent position of this Court has nevertheless been that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored . . . ." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963). Other cases also reveal this Court's view that "[i]mmunity from the antitrust laws is not lightly implied." *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962). *See also Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

With respect to the so-called "learned professions," there is no act of Congress suggesting approval of anticompetitive practices in these sectors of the economy or supplying regulatory machinery which arguably might substitute for primary reliance on an antitrust regime. Without a clear expression of Congressional intent to exempt a specific sector, this Court has generally refused to read such an intent into the antitrust statutes, even for strong policy reasons. In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), this Court rejected the argu-

ment that the Sherman Act, 15 U.S.C. §1 *et seq.* (1970), adopted prior judicial decisions that insurance was not "commerce" (322 U.S. at 553-62) and resisted implying an exemption based on state regulation (*id.* at 547-49) or general policy considerations (ruinous competition) (*id.* at 561-62). Likewise, in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), this Court refused to conclude that Congress meant to exempt bank mergers from section 7 of the Clayton Act, 15 U.S.C. §18 (1970), despite much stronger evidence of contrary Congressional intent than appears in the case of the "learned professions." *Compare* 374 U.S. at 335-49 *with id.* at 373-96 (Harlan, J., dissenting).

Flood v. Kuhn, 407 U.S. 258 (1972), is perhaps the only case in which this Court might be said to have recognized an antitrust "exemption" without explicit Congressional guidance, although there was in that case strong basis for reliance on Congressional inaction. However, *Flood* presented additional circumstances which are wholly lacking here — namely a long history of exemption based on an ancient finding that interstate commerce was not involved. Thus, in the absence of a definitive prior decision that the antitrust laws do not apply to the professions, a reversal of the Court of Appeals decision on this issue would not fundamentally disrupt an established industry, jeopardize innumerable employment relationships, upset justified expectations, or otherwise unduly penalize reliance on an opposite legal interpretation. *Cf. United States v. South-Eastern Underwriters Ass'n*, 322 U.S.533 (1944). There is therefore no warrant here for hesitancy in declaring antitrust's applicability of the kind which influenced this Court in *Flood* to perpetuate the historical judicial dispensation for baseball. The instant

case is perhaps closer to the cases involving other forms of professional athletics, as to which this Court has shown no similar hesitancy in declaring antitrust's role. *See, e.g., Radovich v. Nat'l Football League*, 352 U.S. 445 (1957) (professional football).

B. Acceptance Of The Asserted "Learned Professions" Exemption Would Amount To Judicial Toleration, Without Examination, Of Overt Price-Fixing – A Practice Which Violates Policies So Firm And Fundamental In Antitrust Jurisprudence As To Be Subject To Virtually No Other Judicially Established Exception.

In addition to narrowly construing Congressional enactments seemingly subversive of antitrust policies, this Court has largely foresworn its own and lower federal courts' right to carve out exceptions to the antitrust laws' procompetitive policy. Thus, one of this Court's great jurisprudential achievements has been its firmness in resisting persistent and repeated temptations to water down the firm prohibition against price-fixing in all of its many manifestations. Aside from the Depression case of *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), this Court has hewed close to the principle that producer groups are not to tamper with, "the central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59 (1940), and has rejected claims for exceptional treatment of price-fixing schemes on the basis of alleged special circumstances, good intentions, ineffectiveness, and so forth, thus laying a cornerstone essential to the preservation of an economy based on free enterprise and competition. *See, e.g., Citizen*

Publishing Co. v. United States, 394 U.S. 131 (1969); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). As this Court stated in *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 489 (1950), "It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end."

In order to avoid having to overcome an extremely heavy, if not insurmountable, burden of establishing that the legal profession is somehow a special case when it comes to fixing prices, respondents in this case have sought to frame the issue as one of professional "exemption" rather than price-fixing "exception." The majority of the Court of Appeals was trapped by this tactic into sacrificing the strong policy against price-fixing without significant judicial inquiry into the public benefits, if any, to be thereby achieved.

A decision that the antitrust laws apply to the professions as they do to all other service industries would not inevitably result in the condemnation of the minimum fee schedules challenged in this case, although it would carry with it a substantial likelihood of that result. *Per se* rules in antitrust are to some extent rules of *stare decisis*, and relevant factual distinctions are not to be ignored. Of course, the strength of the antitrust laws' procompetitive policy dictates that few factual differences will be seen as legally relevant distinctions, and this "hard-line" policy is amply supported by the need to economize on judicial time and energy, to deter efforts to camouflage antisocial behavior, and to forge a legal rule clear enough for enforcement in criminal proceedings. Nevertheless, respondents in this case would be free to argue that the minimum fee schedules constituted valid ancillary restraints

of trade, necessary and reasonably tailored to maintain a reasonable standard of professional services. *Cf. United States v. Columbia Pictures Corp.*, 189 F.Supp. 153, 178 (S.D.N.Y. 1960); *United States v. Morgan*, 118 F.Supp. 621, 689-691 (S.D.N.Y. 1953). Although this defense might easily fail, if, for example, less restrictive means of assuring adequate services to the public were available, it is important to note that the antitrust laws, even in an area where *per se* rules prevail, permit the courts to attend to the true issues.

C. The Asserted "Learned Professions" Exemption Would Sweep Broadly And Indiscriminately, Encompassing An Uncertain Number Of Other Professions And Legitimizing A Wide Range Of Anticompetitive Practices, Some Of Which Might Be Even More Detrimental To The Public Than The Fee Schedules Involved In This Case.

The Court of Appeals majority has provided a sweeping dispensation for restraints occurring within the legal profession which it had no occasion or opportunity to examine. The "learned professions" exemption which it announced would also provide immunity for an uncertain, but probably large, number of anticompetitive activities of other professions.

It is, of course, disturbingly unclear which of the innumerable licensed occupations would qualify for the exemption recognized by the majority below. This circumstance alone — pregnant with possibilities for invidious distinctions of a shockingly elitist character — should weigh heavily against attaching weight to "learning" or "professionalism." Special antitrust treatment for the professions is particularly questionable at a time in the nation's history when lawyers

and doctors, the two professional groups most obviously benefited, are seen as, at best, no more than human in their pursuit of such worldly things as power and money.

Recognition of an antitrust exemption for the legal profession, if it should subsequently appear that other professions were not entitled to similar immunity, could eventually embroil the federal courts in inconsistencies similar to those reflected in this Court's treatment of professional athletics under the antitrust laws. Early recognition of baseball's "exemption," *Federal Baseball Club v. Nat'l League*, 259 U.S. 200 (1922), coupled with this Court's reluctance thereafter to change the rules of "the national pastime," *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972), was not carried over to other sports, *e.g., Radovich v. NFL*, 352 U.S. 445 (1957). The reasoning necessary to preserve baseball's special status without conferring immunity on other forms of professional athletics was most unsatisfying, even to the Justices comprising the majority in the *Flood* case. 407 U.S. at 282. It should be clear to this Court that similar rationalizing in defense of a similarly privileged status for the legal profession would be most unseemly and indeed might lead the general public to view the Court not merely as an overly tolerant observer but as an active participant in the lawyers' conspiracies it tolerates. Even if the exemption is ultimately not confined to lawyers alone, it underscores current widespread concern about elitism, special privilege, and double standards of justice in American life.

The Court of Appeals had before it no information regarding any profession other than the legal profession. Yet its decision, if allowed to stand, could reverberate through a large portion of the economy, establishing a dispensation

for many activities which the Court of Appeals could not have contemplated. Part III of this brief illustrates some of the possible implications for the health care delivery system of a "learned professions" exemption. That discussion should help to reveal the hazards of implying an antitrust exemption which sweeps broadly and indiscriminately whe, as discussed in Part II of this brief, antitrust principles can be sensitively applied so as to further the public's interest in efficient performance of the various markets for professional services without sacrifice of essential values.

II

THERE IS AMPLE ROOM UNDER AN ANTITRUST REGIME FOR THOSE PROFESSIONAL ACTIVITIES WHICH SERVE THE PUBLIC WELL

As already observed in Part I(B) of this brief, the capacity of the antitrust laws to deal sensitively with relevant special circumstances which may be discovered in particular professions makes it unnecessary for this Court to recognize the occasional existence of such circumstances by creating an exempt sector of the economy. The following widely quoted language of this Court in *United States v. Oregon State Medical Society*, 343 U.S. 326, 336 (1952), on which the Court of Appeals majority in part relied, should be read to mean no more than that the antitrust laws are to be applied with circumspection in sensitive areas:

> We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This

> Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession. [citation omitted]

The teaching of *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), is that recognized self-regulatory responsibilities and antitrust concerns can and should be reconciled to curtail the potential for abuse. Similarly, in *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961), this Court objected to the use of boycotts to enforce product safety standards but left the door open to industry-initiated standards which were given effect in less dangerous ways. It remains open to this Court to develop standards for appraising professional self-regulatory activity in light of anticompetitive hazards.

Just as this Court could employ its experience in reconciling antitrust policies with legitimate self-regulatory activities in this case, its application of the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), should likewise give appropriate scope to antitrust policy. This would mean rigorous insistence on preserving competition wherever Congress has not indicated an intent to defer to state policy — as it had done in *Parker v. Brown, id.* at 354-58, and has done even more explicitly with respect to the insurance industry in the Mc Carran-Ferguson Act, 15 U.S.C. § 1012 (1970). This Court's policy of adopting narrow constructions of federal legislation which conflicts with antitrust policy should be matched by an even greater unwillingness to sacrifice Congressional policy in the absence of both a clear state policy and other controls adequately substituting for an antitrust regime. Broad, uncontrolled delegations to professional groups, of the kind blessed by the majority below in exempting the state bar under *Parker v. Brown*, should be closely

circumscribed by antitrust protections, and there should be no hesitancy in invoking federal preemption where the state has sacrificed competition without federal warrant or a substitute which could reasonably be expected to serve the federal purpose. It would be surprising if the express exemption for insurance, "to the extent that such business is . . . regulated by state law," 15 U.S.C. § 1012, were not more extensive than the implied exemptions created for other industries under state legislation and *Parker v. Brown.*

In general, it appears that antitrust policy could effectively guide professional activities without sacrifice of essential values and with profit to the public in the elimination of anti-competitive practices. Indeed, the higher purposes of professionalism can be better fostered within an antitrust framework than outside of it. As District Judge Bryan observed in this case, minimum fees are "the least learned part of the profession," 355 F.Supp. at 495. There should be no doubt about judicial competence to look behind a "profession's professions" to economic reality.

III

THE MARKET FOR MEDICAL SERVICES HAS IMPORTANT MONOPOLISTIC FEATURES. BECAUSE THE CONCERTED ACTIVITIES OF THE MEDICAL PROFESSION HAVE CONTRIBUTED TO THE PRESERVATION AND EXTENSION OF MONOPOLY POWER, APPLICATION OF THE ANTITRUST LAWS TO SUCH PROFESSIONAL ACTIVITIES WOULD HAVE IMPORTANT PUBLIC BENEFITS.

Each physician possesses a substantial degree of monopoly power over his individual patients. This monopoly power is not unlawful under the Sherman Act, since it

results from natural conditions of the medical marketplace, such as the patient's ignorance of the technical aspects of medicine, his difficulty in "shopping" for alternative providers or treatments, and his reluctance to economize where his or a family member's health is concerned — particularly where private insurance or a public program pays all or a portion of the cost. Market power of this kind opens opportunities for exploitation, and the public clearly relies significantly on the physician's personal ethics and on the profession's own internal controls to protect against such abuses as overcharges, redundant x-rays and lab tests, and unnecessary surgery or office visits. Society's decision to restrict entry into the business of providing medical services and to delegate control of the supply of physicians in some measure to the medical profession has, of course, increased practitioners' market power by removing possible "close substitutes" for many of the physician's services. *Cf. United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 394 (1956).

If professionalism has any meaning, it must refer to the existence of conditions necessitating the consumer's delegation of important decision-making power to the provider of services. Thus, what arguably distinguishes a profession from other businesses is the very set of factors which produces a high degree of market power, and the argument for a "learned professions" exemption appears to suggest that the more monoply power possessed by the members of a particular profession, the weaker is the case for applying the antitrust laws to it. Anomalous though such a doctrine would seem to be, it reveals the true line which the policy argument must take — namely, that natural market conditions so limit the opportunity for, or the desirability of, relying on consumer choice and competition that these controls should be scrapped entirely.

This argument is based on two assumptions; first, that antitrust principles, competition, and the operation of the market can have no benefit at all (or, alternatively, will generate harms exceeding the benefits). And, second, that the professions themselves can be relied upon to supply adequate alternative mechanisms of social control. As argued in Part I of this brief, these arguments are better addressed to Congress, which can evaluate the underlying assumptions, than to the courts, which have correctly established antitrust as a fundamental policy which Congress and, to a lesser extent, the state legislatures alone can set aside. Moreover, as suggested in Part II of this brief, these arguments for blanket immunity underestimate the ability of antitrust principles to take relevant special circumstances into account.

The specific argument in this Part III is that, in the absence of vigorous application of the antitrust laws, the concerted activities of the medical profession have increased practitioners' monopoly power and have curtailed market developments which would have reduced it. It is submitted, on the strength of this showing, that the antitrust laws could be appropriately applied to the activities of professional associations and that the potentiality of public benefit from enforcement in these areas has yet to be fully realized.

Medical societies, it is true, behave somewhat differently than do classical cartels, seldom engaging in overt price-fixing. Yet their capacity for harm is no less on that account. Because their members already possess market power in their own right arising from the nature of their services, it is unnecessary for medical societies to forge additional monopoly power by anticompetitive agreements. Instead, they need only to preserve those market conditions which guarantee their members' market power.

Some parallels to ordinary cartel behavior may of course be noted. Although medical societies have not fixed minimum fees as did the county bar association in this case, fee schedules promulgated under society-sponsored Blue Shield plans may have had the effect of standardizing fees for patients not covered by Blue Shield policies. Similarly, some medical societies have promulgated "relative value" scales, which suggest multipliers by which physicians may relate their charges for each particular service to every other, a practice which fosters greater pricing uniformity than could otherwise prevail. The medical societies have also engaged in a kind of market division — another typical cartel practice — by enforcement of practitioners' ethical undertakings against advertising and by discouraging criticism of competitors thus, in effect recognizing each doctor's "sphere of influence" over his particular patients. A further parallel to other cartels appears in the medical societies' historic commitment to preservation of a pricing system ("fee-for-service") which facilitates discriminatory pricing and thus allows the physician-monopolists to maximize their returns without reducing the quantity of services supplied. *See, e.g.*, Kessel, "Price Discrimination in Medicine," 1 *J. Law & Econ.* 20 (1958). For examples of other cartels' commitments to discriminatory pricing systems, *see FTC v. Cement Institute*, 333 U.S. 683 (1948) ("basing-point" pricing); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) ("runs and clearances"); Securities Exchange Act Release No. 8239 (1968) (repression of cost-justified quantity discounts and "give-ups" on brokerage services).

The power of a coalition of lawful monopolies, such as those possessed by individual medical practitioners, may be greater than the sum of its parts, giving rise to antitrust

concerns. *Cf. United States v. Grinnell Corp.*, 384 U.S. 563 (1966). Thus, a medical society can preserve and strengthen the monopoly power of each physician-monopolist in the following ways:

> *— by enforcing mutual recognition of "spheres of influence," stifling competitive impulses, and generally fostering an "ethic" which causes the more conscientious providers to avoid commercialism,* thus guaranteeing fulfillment of the prophecy that commercialized practice attracts the less "ethical" members of the profession. The use of "business honor and social penalties" to reduce competition was a major factor in *American Column & Lumber Co. v. United States*, 257 U.S. 377, 411 (1921). *Compare* Kessel, 1 *J. Law & Econ.* at 45-46 (1958).

> *— by collective maintenance of the conditions giving rise to practitioners' market power, particularly consumer ignorance.* The ban on advertising, even of relevant credentials, American Medical Ass'n, Principles of Medical Ethics §5 (1971), suggests the professions' unwillingness to acknowledge that significant quality differences exist among practitioners. *Compare FTC v. Cement Institute*, 333 U.S. 683, 715 (1948), noting that the trade association, "in the interest of eliminating competition, suppressed information as to the variations in quality that sometimes exist in different cements."

> *— by collective maintenance of conditions hampering consumers' ability to combine for increased bargaining effectiveness* through such mechanisms

as those referred to by this Court as "contract practice" in *United States v. Oregon State Medical Society*, 343 U.S. 326, 328 (1952). Although this Court had outlawed egregiously anticompetitive behavior toward certain alternative health care plans, *United States v. American Medical Ass'n.*, 317 U.S. 519 (1943), the tactics of the Oregon State Medical Society were upheld even though the effect of the Society-sponsored insurance plan was to stifle cost-control efforts by health insurers and other types of plans which might have benefitted consumers by policing unnecessary services or excessive charges. Although facts permitting a final judgment do not appear in the record of the case, this result was probably achieved by a kind of "disciplinary" pricing (below-cost, with losses underwritten by the Society), which established the Society's Blue Shield-type plan as the industry leader and model of insurer conduct.

— *by collective cooptation of new forms of health care delivery and financing* which, if independently marketed, would make available to the public a competing "close substitute" for fee-for-service medicine. If "cross-elasticity of demand" is high, the availability of such a substitute would greatly weaken the monopoly power possessed by fee-for-service practitioners. *Compare United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956). On methods employed by medical societies to control new forms of financing

and delivery and to dominate independent plans, see *United States v. AMA*, 317 U.S. 519 (1943); *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952); *Group Health Cooperative v. King County Medical Society*, 39 Wash.2d 586, 237 P.2d 737 (1951); Havighurst, "Health Maintenance Organizations and the Market for Health Services," 35 *Law and Contemp. Prob.* 716, 759-77 (1970) (discussing, among other things, the so-called "foundations for medical care").

— *by using the self-regulatory powers granted by Congress to penalize or handicap innovative, competitive providers*, such as health maintenance organizations. Considerable opportunities for such abuse are provided for Professional Standards Review Organizations created under the Social Security Amendments of 1972, 42 U.S.C. §1320c *et seq.* (Supp. II, 1972). *Compare Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

— *by influencing legislation and state and federal agencies' regulatory performance.* It is possible to question the extent to which the principles of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), would shelter professional domination of state regulatory agencies of the sort recently alleged to exist in the State of Texas in recent Congressional hearings. *See* Hearings on Competition in the Health Care Industry, Subcomm. on

Antitrust and Monopoly, U.S. Senate Comm. on the Judiciary, 93d Cong., 2d Sess. (May 14-15, 1974).

In the light of the foregoing activities designed to maintain consumer ignorance and dependence and the dominance of fee-for-service medicine, it is possible to suspect disingenuousness in the medical profession's reverence for the "doctor-patient relationship," in the name of which many restraints have been imposed. Indeed, it may seem to spring not so much from ethical impulses as from the natural desire of a monopolist to protect his "relationship" with the consumers he exploits. Although the sacred aspect of the doctor-patient relationship should of course be highly valued, doctors have been much criticized for making it too one-sided, not only as a matter of economics but also in human terms. *Cf.* the issue of "informed consent" as elaborated in *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), and *Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1 (1972).

The foregoing brief survey of the medical profession's activities suggests not only the presence of anticompetitive behavior by the medical profession but also many of the ways in which the antitrust laws could either rectify abuses or at least provide a check on excesses which might occur under color of professionalism or of state or federal legislation. Although the decision of the Court of Appeals majority seemingly excludes many of the medical profession's concerted activities from scrutiny under the antitrust laws, some anticompetitive practices of medical societies would apparently remain subject to antitrust attack. In recognition of this Court's use of antitrust laws in the *AMA* case to curb particularly flagrant restraints practiced against a consumer-sponsored

prepaid group medical plan, the Court of Appeals indicated that, while restrictions imposed by professionals on fellow professionals are exempt, restrictions imposed upon outsiders, such as insurers, would not be; thus, a doctors' conspiracy "to obstruct the interstate sale of health insurance" was said in dicta not to be exempt. 497 F.2d at 15.

The majority below would thus apparently apply the antitrust laws where the brunt of the restraint is borne by someone or some entity other than an individual professional but not where consumers are directly victimized, as they are by lawyers' minimum fee schedules or by the repression of useful information. It would seem appropriate for this Court to remind the majority below that it is consumers whose interests are at stake in antitrust policy and that it is through protection of competition, not merely through vindication of competitors, such as Group Health in the *AMA* case, that consumer protection is ultimately achieved. *Cf. Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). To limit the role of the antitrust laws to policing only those restraints practiced against "close substitutes" for traditional fee-for-service medicine is to endorse, without warrant, continued monopolization of the latter.

In its attempt to support an exemption for intraprofessional restraints, the Court of Appeals majority failed to examine the *AMA* case with care. Although this Court declined in that case to consider whether the antitrust protection is accorded to Group Health should extend beyond alternative financing and delivery mechanisms, its decision suggests no desire to shield anticompetitive activities of professionals. Moreover, like any doctor or medical group practice, organizations like Group Health are in the business of providing professional services for money. Further, the restraints in the *AMA* case were in fact imposed by professionals not on Group Health itself but on

other professionals, those employed by Group Health. Finally, ethical concerns are at least as important in organizations like Group Health as in traditional medical practice arrangements, and, indeed, the restraints in the *AMA* case were imposed in the name of professional values. Yet this Court found no reason to bow before professionalism. The attempt of the majority below to confine the *AMA* case is thus a failure since no meaningful line can be drawn. There is no basis for declaring illegal only some of the medical societies' tactics for maintaining and enhancing their members' market power.

CONCLUSION

The petition for a writ of certiorari should be granted, so that this Court may consider, among other things, the implications of the decision below for the medical profession.

Respectfully submitted,

CLARK C. HAVIGHURST
Duke University School of Law
Durham, North Carolina 27706
Tel. (919) 684-2636

Amicus Curiae, pro se

September 23, 1974

AFFIDAVIT OF SERVICE

The undersigned, not a member of the bar of the Supreme Court of the United States, hereby certifies that service of the attached Motion for Leave to File and Brief *Amicus Curiae* was made upon all parties required to be served, in accordance with Rule 33(1) of the Supreme Court. Three copies of the Motion and Brief were mailed, first class postage prepaid, certified mail, return receipt requested, from The Main Post Office, Washington, D.C., on September , 1974, to each of the following parties:

Alan B. Morrison, Esq. Suite 700 2000 P Street, N.W. Washington, D.C. 20036	for	Lewis H. Goldfarb and Ruth S. Goldfarb, *et al*, *Petitioners*
Stuart Dunn, Esq. Assistant Attorney General of Virginia State Capitol Richmond, Virginia 23219	for	Virginia State Bar, *Respondent*
T.S. Ellis III, Esq. Hunton, Williams, Gay & Gibson 700 East Main Street Richmond, Virginia 23212	for	Fairfax County Bar Association, *Respondent*

IN WITNESS WHEREOF,

Jack Cawley
General Manager
1732 "Eye" Street, N.W.
Washington, D.C. 20006
(202) 298-5537

SUPREME COURT, U. S.
FILED
DEC 20 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia Homeowners,

Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

**ON A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**PETITION FOR CERTIORARI FILED AUGUST 5, 1974
CERTIORARI GRANTED OCTOBER 29, 1974**

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11.	Letter from Bernstein to Cregger dated July 8, 1965 [Exhibit 40]	54
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(The Opinion of the District Court, together with its Findings of Fact and the Stipulations of the Parties are printed in Appendix A to the Petition for a Writ of *Certiorari* in this case. The Opinion of the Court of Appeals, including the Dissent, is printed as Appendix B to that Petition. The Judgments of the Court of Appeals are printed as Appendix C to that Petition. Accordingly, none of them will be reprinted in this Appendix.)

APPENDIX

RELEVANT DOCKET ENTRIES UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

[Title omitted in printing]

DATE	
1972	
Feb. 22	Complaint filed.
Apr. 3	Answer of Defendant Fairfax Co. Bar Association — filed.
Apr. 14	Answer filed by Va. State Bar.
Sept. 1	Motions to amend complaint and to extend time to complete discovery.
Sept. 8	Trial Proceedings: J. Bryan. This matter came on motion of the Pltf. to amend the complaint and to extend the time within which all discovery must be completed. Appearances of counsel. Motion argued and denied as to adding parties but allowing pltfs. to be dismissed from the action without prejudice. Order to follow.
Sept. 14	Trial Proceedings: (In Chambers) (J. Lewis) This matter came on for formal pre-trial. Appearances of counsel for parties. Motions to be filed in ten days. Defts. have to Sept. 28, 1972 to file additional answers. Motions to be heard on 9/29/72 by Judge Bryan at 2:00 P.M. Motion of Deft. Fairfax County Bar Assoc. for summary judgment filed. Alexandria Bar Assoc. motion to dismiss to be heard on 9/29/72. List of

exhibits and witnesses of Fairfax Bar, Alex. Bar., Arlington Bar, Virginia State Bar filed. Motion to see if pltf is entitled to Jury to be heard on 9/29/72. Case set for hearing on the merits as to liability only on November 6, 1972 with Jury. Memorandum of law to be filed in five (5) days, parties have five (5) days to answer. Proposed stipulations of the Virginia State Bar filed. Proposed pretrial statement on behalf of deft Fairfax Bar Assoc. filed. Pltfs. list of witnesses and exhibits filed.

Sept. 22 — Motion for summary judgment with memorandum of points & authorities in support thereof filed by deft., Va. State Bar.

Sept. 25 — Motion to determine propriety of class action & to provide for notice to class pursuant to R.23(c)(2) — filed by pltfs.

Sept. 28 — Order certifying that this action be maintained as class action entered — filed, copies sent.

Sept. 29 — Trial proceedings: J. Bryan. This matter came on all defts. motion for summary judgment and motion to determine propriety of class action. Appearances of counsell. Arguments heard. Motion for summary judgment denied, case shall be maintained as class action.

Dec. 11 — Trial Proceedings: J. Bryan. This cause came on for approval of settlement. Appearances of counsel, settlement approved order to follow.

Dec. 13 — Trial proceedings: J. Bryan. This cause came on for trial by the Court. Appearances, Parties and counsel. Pltfs. adduced evidence and

rests. Defts. adduced evidence and rests. Post trial brief's to be submitted, matter taken under advisement.

1973

Jan. 5 — Memorandum opinion as to Fairfax Bar Assn. & Va. State Bar Assn. filed (Matter continued to Jan. 26, 1973)

Jan. 17 — Motion to amend judgment together with points & authorities filed by deft., Fairfax Bar Assn.

Jan. 19 — Order denying plfts.' motion to amend findings entered — filed. Copies sent.

Feb. 2 — Trial Proceedings (AVB) Parties appeared. Matter came on for hearing on remaining claim for damages of plaintiffs against deft. Fairfax Bar Assn. Matter stayed. See order and judgment.

Order and judgment as to Virginia State bar and Fairfax Bar Assn. entered and filed — copies to all counsel of record.

Feb. 8 — Notice of appeal of order and judgment of 2/2/73 filed by pltfs. Copies sent.

Feb. 15 — Notice of appeal of Para. I and II of order of 2/2/73 filed by deft., Fairfax Co. Bar. Assn. Copies sent.

Feb. 28 — Motion (renewal) to amend judgment of this Court to make Court's ruling prospective only filed by Fairfax County Bar Assn.

Feb. 28 (continued)	Order denying motion (renewal) to amend judgment of this Court to make Court's ruling prospective only (by Fairfax County Bar Assn.) entered—filed. Copies sent.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

[Title omitted in printing]

COMPLAINT FOR INJUNCTION AND TREBLE DAMAGES UNDER THE ANTITRUST LAWS

I. JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 1 of the Act of Congress of July 2, 1890, 15 U.S.C. § 1, as amended and supplemented, commonly known as the Sherman Act, and Sections 4 and 16 of the Act of Congress of October 15, 1911, 15 U.S.C. §§ 15 and 26, as amended and supplemented, commonly known as the Clayton Act.

2. The purpose of this action is to recover damages against defendants for injuring the individual plaintiffs and class of persons they represent in their individual capacities as homebuyers which injury proximately resulted from defendants' violation of the antitrust laws of the United States; and to restrain and enjoin defendants from continuing the illegal monopoly and the combinations, conspiracies and contracts in restraint of trade and commerce to the injury of the organizational plaintiffs and the class of persons which they represent.

3. The defendants maintain offices, transact business and are each found within the Eastern District of Virginia.

II. PLAINTIFFS

4. Plaintiffs Lewis H. Goldfarb and Ruth S. Goldfarb are husband and wife and reside in Reston, Virginia. On January 15, 1972, they purchased a home in Reston and,

by reason thereof, were required to use the services offered by defendants and their members.

5. Plaintiff Northern Virginia Fair Housing, Inc. is a voluntary non-profit association organized in 1963 and incorporated under the non-stock corporation law of the State of Virginia for the purpose of promoting equal housing opportunities for all persons in Alexandria, Arlington, Fairfax City, Fairfax County and Falls Church, hereinafter referred to as Northern Virginia. In carrying out this purpose, the association, through its members, maintains a housing placement service to assist homeseekers who are unable to locate housing in Northern Virginia either as a result of racial discrimination or because of a scarcity of housing for people of low and moderate incomes. In this latter connection, the association works to encourage local governments, builders, realtors and related parties to join in a common effort to promote the availability of low-cost housing.

6. Plaintiff Housing Opportunities Council of Metropolitan Washington, Inc. operates as a housing opportunities advocate within the metropolitan area of Washington (including the Maryland and Virginia suburban jurisdictions). The Council aims to make it possible for Black and minority homeseekers to rent or buy any existing housing, free of racial barriers and discrimination, and to promote and facilitate the provision of additional housing for low- and moderate-income families in all sections of the metropolitan area. The Council conducts several programs designed to communicate with the general public and specific groups in the area, such as, the housing industry, civic and religious groups, potential Black and low-income homeseekers, government leaders, and large business firms, to make the public and these groups aware of the need and the legal basis for equal housing opportunity, and to enlist the support of these audiences in achieving that objective.

7. The individual plaintiffs bring this action for damages on their own behalf and, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of all similarly situated residents of Reston, Virginia. The organizational plaintiffs bring this action for injunctive relief on their own behalf and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all prospective homebuyers in the Washington Metropolitan Area. The classes represented by plaintiffs are so numerous that joinder of all members is impracticable; there are questions of law or fact common to the classes and these questions predominate over any questions affecting only individual members; the claims or defenses of plaintiffs are typical of the claims of the classes; plaintiffs will fairly and adequately protect the interests of the classes; defendants have acted on grounds generally applicable to each class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to each class as a whole; and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

III.
DEFENDANTS

8. The Virginia State Bar (hereinafter referred to as the "State Bar") is an association organized and existing under the laws of the State of Virginia and maintains offices and transacts business in the Eastern District of Virginia. All persons who practice law in the State of Virginia are required to become members of the State Bar. One of the functions of the State Bar is to insure that all of its members act in accordance with the standards of professional conduct as codified in the Canons of Ethics promulgated by the American Bar Association. In

order to fulfill this function the State Bar has established a Committee on Ethics and Grievances (hereinafter referred to as the Committee) for each Congressional District in the State. One function of the Committee is to receive complaints against those association members alleged to have violated the canons and to conduct investigations and hold hearings to determine whether formal sanctions against the named party would be appropriate. Formal sanctions include reprimand, suspension and disbarment from the practice of law in the State of Virginia.

9. The Fairfax County Bar Association (hereinafter referred to as the Fairfax Association) is a voluntary association organized and existing under the laws of the State of Virginia. It is composed entirely of state-licensed attorneys who practice in the County of Fairfax. One of the functions of the Fairfax Association is to insure that all of its members act in accordance with the standards of professional conduct as codified in the Canons of Ethics by assisting the local Committee in its efforts to do the same.

10. The Arlington County Bar Association (hereinafter referred to as the Arlington Association) is a voluntary association organized and existing under the laws of the State of Virginia. It is composed entirely of state-licensed attorneys who practice in the County of Arlington. One of the functions of the Arlington Association is to insure that all of its members act in accordance with the standards of professional conduct as codified in the Canons of Ethics by assisting the local Committee in its efforts to do the same.

11. The Alexandria Bar Association (hereinafter referred to as the Alexandria Association) is a voluntary association

organized and existing under the laws of the State of Virginia. It is composed entirely of state-licensed attorneys who practice in the City of Alexandria. One of the functions of the Alexandria Association is to insure that all of its members act in accordance with the standards of professional conduct as codified in the Canons of Ethics by assisting the local Committee in its efforts to do the same.

IV.
THE CO-CONSPIRATORS

12. The members of each of the associations who engage in the practices described herein are not named as defendants but are named as co-conspirators. All of these members participated as co-conspirators in the offense alleged herein and performed acts and made statements in furtherance thereof.

V.
NATURE OF TRADE AND COMMERCE

13. The activities of the associations and their members, as described herein, are within the flow of interstate commerce and have an effect upon that commerce.

14. Members of the associations perform all the legal services incident to the purchase and sale of real estate in Northern Virginia, including, but not limited to, title examination, preparation of and recordation of documents. Thousands of parcels of real estate are sold in Northern Virginia each year.

15. Because of the transient nature of a significant portion of the population of the Metropolitan Washington D.C. area, of which Northern Virginia forms a part, a substantial number of persons using the services of members

of the associations in connection with real estate sales are persons moving into Northern Virginia from places outside the State of Virginia and persons moving from Northern Virginia to places outside the State of Virginia.

16. Because the State of Virginia requires that all of the aforementioned services be performed only by attorneys licensed to practice law within the State, persons moving to and from places outside of the State must use the services of the members of the associations. The policies, acts and practices of the associations and their members thereby affect the aforesaid interstate movement of persons.

17. As an additional part of their service members of the associations often assist their clients in the preparation of documents incident to securing the financing necessary to the purchase of real estate in Northern Virginia and in obtaining property and title insurance for it. Such financing and insurance is often obtained from sources outside the State of Virginia and moves in interstate commerce into the State of Virginia through the activities of members of the associations.

VI.
OFFENSE

18. For many years up to and including the date of filing of this Complaint the defendants and co-conspirators have been continuously engaged in an unlawful combination and conspiracy to restrain the aforesaid interstate trade and commerce in the offering for sale and sale of legal services in the Washington Metropolitan Area and throughout the State of Virginia in violation of Section 1 of the Sherman Act. Said unlawful combination and conspiracy is

continuing and will continue unless the relief hereinafter prayed for is granted.

19. The aforesaid combination and conspiracy have consisted of a continuing agreement and concert of action between the defendants and co-conspirators to raise, fix and maintain the fees for legal services performed by members of the associations.

20. In effectuating the aforesaid combination and conspiracy the defendants and co-conspirators have done things which, as hereinbefore alleged, they agreed and conspired to do, including, among other things, the following:

a) Circulated and adhered to published recommended fees for legal services commonly known as "minimum fee schedules".

b) Established local committees to investigate and enforce alleged violations of the minimum fee schedule.

c) Subjected any member or licensed attorney who habitually failed to abide by the minimum fee schedule to sanctions by the associations, including revocation of the license to practice law.

VII.
EFFECTS ON PLAINTIFFS

21. The aforesaid combination and conspiracy has had the following effects, among others, on the individual plaintiffs and the class which they represent:

a) The fees charged for legal services incident to the purchase of a home have been

raised, fixed and maintained at an artificial and non-competitive level;

b) As a direct result of the acts of defendants and co-conspirators described herein, plaintiffs and the class they represent have suffered and continue to suffer injury to their business and property.

22. The aforesaid combination and conspiracy has had the following effects, among others, on the organizational plaintiffs and the class they represent:

a) The cost of legal services incident to the purchase of a home in Northern Virginia has been raised, fixed and maintained at an artificial and non-competitive level thereby increasing the total cost of housing in Northern Virginia.

b) Because the total cost of purchasing a home in Northern Virginia has been inflated in the aforesaid manner, plaintiffs' efforts to find housing in that area for low and moderate income families is substantially impeded.

c) As a direct result of the acts of defendants and co-conspirators described herein, plaintiffs and the class they represent have suffered and continue to suffer injury to their business and property.

VIII.
DAMAGES

23. As a consequence of the unlawful act of defendants, as aforesaid, the individual plaintiffs and the class they

represent have been injured in their business and property in the approximate amount of $400,000 as of the date of filing of this complaint.

24. All plaintiffs and the classes they represent continue to incur injury to their business and property for as long as defendants persist in their unlawful conduct.

WHEREFORE Plaintiffs pray:

1. That the Court adjudge and decree that the defendants and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in the sale of legal services in the State of Virginia in violation of Section 1 of the Sherman Act.

2. That the defendants and all other persons acting or claiming to act on their behalf and each of their members be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combination and conspiracy hereinbefore alleged, or from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program or device having a similar purpose or effect.

3. That the defendants, and all other persons acting or claiming to act on their behalf, and each of their members, be enjoined and restrained from agreeing to adhere to any schedule concerning the amounts of any fees for the performance of legal services in the State of Virginia.

4. That judgment be entered in favor of the individual plaintiffs and the class they represent against defendants in a sum equal to treble the amount of damages suffered by said plaintiffs and the class they represent by

reason of the violations of the law herein complained of, together with costs of this suit and reasonable attorney's fees; and

5. That plaintiffs have such further relief as the Court may deem to be just and proper.

/s/ William R. Durland
/s/ Lewis H. Goldfarb
3934 Old Lee Highway
Fairfax, Virginia 22030
Ph. 591-4136
Attorneys for Plaintiffs

DISTRICT OF)
: ss.:
COLUMBIA)

The undersigned, being duly sworn, deposes and says that he is a plaintiff in the above action; that he has read the foregoing complaint and states that it is true to the best of his knowledge, belief or information.

/s/ Lewis H. Goldfarb
Plaintiff Lewis H. Goldfarb

Sworn to before me this 18th
day of February, 1972

/s/ _____
Notary Public

STATE OF)
: ss.:
COUNTY OF)

The undersigned, being duly sworn, deposes and says that she is a plaintiff in the above action; that she has read the

foregoing complaint and states that it is true to the best of her knowledge, belief or information.

/s/ Ruth S. Goldfarb
Plaintiff Ruth S. Goldfarb

Sworn to before me this 20th
day of Feb., 1972.

/s/_____
Notary Public

DISTRICT OF)
: ss.:
COLUMBIA)

The undersigned, being duly sworn, deposes and says that he is a plaintiff in the above action; that he has read the foregoing complaint and states that it is true to the best of his knowledge, belief or information.

/s/ Lewis H. Goldfarb, Pres.
Plaintiff Northern Virginia
Fair Housing, Inc.

Sworn to before me this 18th
day of February, 1972

/s/_____
Notary Public, D.C.

DISTRICT OF)
: ss.:
COLUMBIA)

The undersigned, being duly sworn, deposes and says that he is a plaintiff in the above action; that he has read

the foregoing complaint and states that it is true to the best of his knowledge, belief or information.

/s/ James H. Harvey
Plaintiff Housing
Opportunities Council
of Metropolitan Washington

Sworn to before me this 18th
day of February, 1972

/s/_____
Notary Public

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

[Title omitted in printing]

ORDER AND JUDGMENT

This cause having been tried on December 13, 1972, and this Court having issued its Memorandum Opinion and Findings of Fact dated January 5, 1973, which are hereby incorporated herein by reference, now therefore it is hereby

I

ORDERED, ADJUDGED, AND DECREED that the 1962 and 1969 Minimum Fee Schedules of the defendant Fairfax Bar Association are declared to be unlawful and in violation of the Sherman Act, 15 U.S.C. § 1, and the defendant Fairfax Bar Association is directed to cancel its schedule of June 12, 1969, and is hereby enjoined from adopting, publishing or distributing any such schedules of minimum or suggested fees, including copies of the existing schedules; and it is further

II

ORDERED, ADJUDGED, AND DECREED that within thirty days from the entry of this Order and Judgment, the defendant Fairfax Bar Association shall mail a copy of this Order and Judgment to each of its members and shall advise them that the Minimum Fee Schedule dated June 12, 1969, has been cancelled as of the date hereof; and it is further

III

ORDERED, ADJUDGED, AND DECREED that the complaint is hereby dismissed as against the defendant Virginia State Bar; and it is further

IV

ORDERED, ADJUDGED, AND DECREED that all further proceedings with respect to the remaining claim for damages of the plaintiff class against the defendant Fairfax Bar Association are hereby stayed pending the determination of the appeal of the plaintiffs from paragraph III of this Order and Judgment and pending the determination of the appeal of the defendant Fairfax Bar Association from paragraphs I and II of this Order and Judgment.

There appearing to the Court to be no just reason for delay in entry of this Order and Judgment as to the claim of plaintiffs against the defendant Virginia State Bar and the claim of plaintiffs for declaratory and injunctive relief against the defendant Fairfax Bar Association, now, therefore, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court hereby expressly directs the Clerk of the Court to enter this Order and Judgment forthwith.

Dated: February 2, 1973

/s/_____
Albert V. Bryan, Jr.
United States District Judge

[Exhibit 26]

VIRGINIA STATE BAR

MINIMUM FEE SCHEDULE REPORT

1962

Printed with the Compliments of
THE MICHIE COMPANY

To the Members of the Virginia State Bar:

> "The lawyers have slowly, but surely, been committing economic suicide as a profession."

Five years of study by a special committee of the American Bar Association resulted in the foregoing conclusion. Similar studies by many state bar organizations showed that such conclusion is warranted.

One of the remedies for the economic problem is the promulgation or adoption of a suggested minimum fee schedule on a state-wide basis. The Virginia Canons of Professional Ethics (canon 12) state "it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association". Traditionally, lawyers have always had occasions to discuss with their brethren the fair evaluation of services and the setting of fees. A state-wide schedule is, in effect, a state-wide discussion of what constitutes fair and reasonable minimum fees.

The enclosed statement of fees is *not* a minimum fee schedule. It is a compendium of a two-year study of legal fees in Virginia. At the 1962 Annual Meeting of the Virginia State Bar the Bar's Council voted favorably on this dissemination of the statement.

The study was made by the Bar's Committee on Economics of Law Practice. First, the Committee carefully examined and considered the twenty-one minimum fee schedules that have already been adopted by local bar organizations in Virginia. Secondly, the Committee received and carefully considered the numerous fee schedules that have been adopted in other states. Thirdly, (and most important) the Council of the Bar made a state-wide study of minimum fees in the judicial circuits of Virginia and submitted same to the Committee.

The Committee began the processing of all returns, and existing local Virginia schedules, and arrived at the average and median fees charged on a state-wide basis. Following this, the entire eight-man committee met to consider what would represent fair fees in 116 instances in 15 fields of law. The fees shown in the enclosed statement represent the considered judgment of the Committee as to fair minimum fee in each instance.

After careful consideration, it was the unanimous opinion of the Committee that the best interests of the members of the Virginia State Bar require a *consideration* of the adoption of some form of minimum fee schedule. The final form must be and should be left to a decision by the *entire* bar. Such an important step should have the consideration and judgment of all Virginia lawyers before any positive proposal be made or action taken. The members are earnestly invited to submit their comments and recommendations which will be given careful consideration by the Committee.

The Committee feels that its membership has afforded as good a coverage, not only geographically, but also in experience in the fifteen branches or fields of practice as has been reasonably practical in a matter of this kind. However, there are areas of the state which may

have particular practices and problems not known to the Committee, and there are certainly branches or fields of practice in which other members of the Bar are better qualified and more experienced than the Committee members. We urge that all inequities or omissions be called to the attention of the Committee.

Following this, the Committee will then submit to the Virginia State Bar its further recommendations as to the advisability of adopting some form of schedule of minimum fees, the mechanics of so doing, and the methods of implementation.

COMMITTEE ON ECONOMICS OF LAW PRACTICE
203 Governor Street
Richmond 19, Virginia

* * *

Schedule of minimum fees

5% on first $50,000
4% of next $50,000
3% of next $400,000
2% of all above $1,000,000
} on the gross principal value of probate assets as of date of death

In no event shall the fee for full administration be less than $25.00

REALTY

Title examinations (not including closing, settlement, preparation of papers):

(a) 1% of the first $30,000.00 of the loan amount or purchase price.

(b) ½ of 1% of the loan amount or purchase price from $30,000.00 to $250,000.00.

(c) Over $250,000.00 of loan amount or purchase price, by negotiation or agreement, but not less than the fee for $250,000.00.

(d) Minimum fee for title examination, $50.00.

(e) Simultaneous examination of title for purchaser and lender, the above minimum fee based on purchase price shall apply, except an additional fee of not less than $25.00 shall be made.

(f) Limited title certificate or so-called run-up:
Your Committee recommends against the use of any limited title certificate, based on a search for less than the customary period of time, due to the inherent hazards and perils involved in such an undertaking. In cases where this has been fully explained to the client and he nevertheless insists upon such a limited title examination, the fee set forth in paragraph (d) above, in addition to the fees for closing, and settlement, and preparation of papers, shall apply as a minimum.

Deed of bargain and sale ..... $ 15.00
Deed of bargain and sale and assumption 20.00
(If description or other information not furnished, add $5.00 to above.)
Assumption Transactions: In assumption transactions the minimum title examination fee of $50.00, applicable to Limited Title Certificate or so-called run-up chargeable to the buyer shall be in addition to the fee for preparation of the deed and for the closing and settlement fees chargeable to the respective parties.
Deed of trust and note 25.00
Deed of release 15.00
Contract of sale—See Contracts and Agreements.

Lease—See: Contracts and Agreements.
Waiver letter—Services incident to obtaining letter from FHA or VA waiving title defects 10.00
Closing and settlement fees, in addition to fees for title examination and preparation of papers:

(a) Closing and escrow fee, to purchaser or borrower .. 25.00
Explanation: This fee required upon preparation of statement, and disbursement of funds on behalf of or for account of purchaser or borrower, *plus*

(b) Settlement fee, to seller 25.00
Explanation: This fee required upon preparation of settlement statement, proration of amounts due to and from seller and disbursements of sales proceeds for account of seller.
Note: An attorney who conducts the entire transaction shall charge the above settlement and closing fees to the respective parties.

Marginal release, examination thereof made by anyone other than closing attorney 5.00
Marginal release, as noteholder or as attorney in fact for noteholder 10.00
Mechanic's lien, preparation and filing with notices 50.00

TAX MATTERS

General Statement:
The total fee for a particular matter shall include charges for time consumed in conferences with clients and in research and shall reflect the novelty and complexity of points of law involved, the tax benefits to the client, and the responsibility involved. The fee shall give effect to a minimum hourly rate charged by the attorney involved.

WILLS AND ESTATE PLANNING

Whenever Federal estate taxes constitute a material factor, the charges to be made for the following instruments should be increased appropriately. Also, additional charges should be made for the time consumed by conferences, preparation of other instruments, supervision of execution of documents, and other duties, with due consideration being given to the importance of the matter, the responsibility involved, and the experience of the attorney.
Wills:

(a) Of basic type, not including future interests, trusts or fiduciary powers 25.00

(b) With trust provisions for family protection and preservation of small estates 75.00

[EXHIBIT 27]

VIRGINIA STATE BAR

MINIMUM FEE SCHEDULE REPORT

1969

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MINIMUM FEE SCHEDULE REPORT (1969)

STATEMENT BY COMMITTEE ON PROFESSIONAL EFFICIENCY AND ECONOMIC RESEARCH

The Minimum Fee Schedule Report (1969) submitted herewith by the Committee on Professional Efficiency and Economic Research updates the previous report submitted by a similar committee and approved by Council in 1962. The report *does not* constitute a state-wide minimum fee schedule but, as in 1962, is a report on the analysis of existing suggested fee schedules in Virginia. The committee bases its report on an analysis of some twenty-two minimum fee schedules which have been adopted by local bar associations in Virginia. Copies of the spread sheets used for this analysis are attached for reference.

The recommended minimum fee figures in the committee's report represent the consensus recommendations of members of the committee as to the minimum fees which should be assessed in 1969 for the various legal services indicated.

It will be noted that the revised report reflects a general scaling up of fees for legal services. The committee feels that this is to be expected because of the escalating cost of operating a law office and the spiraling increase in the cost of living in recent years. In a few instances there are substantial differences in the 1969 recommended minimum fees compared with the 1962 recommended minimum fees. These wide differences are due largely to what the committee believes to have been inexact appraisals in the past of reasonable minimum fees for certain legal services. Experience during the past seven years has been sufficient to enable the committee to recommend adjustments to correct obvious errors in judgment, which incidentally were notably few in number. The present committee is certainly subject to errors in judgment also, and future committees will undoubtedly find it necessary to make correcting recommendations based on accumulating experience.

The committee recommends that Council approve the Committee's report on minimum fee schedules and that the report be promulgated to the entire Bar of Virginia for its consideration. It should be clearly understood that no local bar association is bound by the committee's recommendations; that certain adjustments will have to be made in various circuits within the State. The schedule is submitted simply as recommendations and for the guidance of local bar associations.

REALTY

Title examinations (not including closing, settlement, preparation of papers):

(a) 1% of the first $50,000 of the loan amount or purchase price

(b) ½ of 1% of the loan amount or purchase price from $50,000—250,000

(c) Over $250,000 of loan amount or purchase price, by negotiation or agreement, but not less than the fee for $250,000

(d) Minimum fee for title examination, $75

Deed of bargain and sale 20.00

Deed of bargain and sale and assumption 30.00

(If description or other information not furnished, add $5.00 to the above.)

Assumption Transactions; in assumption transactions the minimum title examination fee of $50.00, applicable to Limited Title Certificate or so-called run-up chargeable to the buyer shall be in addition to the fee for preparation of the deed and for the closing and settlement fees chargeable to the respective parties.

Deed of trust and note 30.00

Deed of release 20.00

Contract of Sale - See: Contracts and Agreements.

Lease - See: Contracts and Agreements.

Waiver letter - Services incident to obtaining letter from FHA or VA waiving title defects 15.00

Closing and settlement fees, in addition to fees for title examination and preparation of papers:

(a) Closing and escrow fee, to purchaser or borrower 30.00
Explanation: This fee required upon preparation of statement, and disbursement of funds on behalf of or for account of purchaser or borrower, plus

(b) Settlement fee, to seller 30.00
Explanation: This fee required upon preparation of settlement statement, proration of amounts due to and from seller and disbursements of sales proceeds for account of seller.
Note: An attorney who conducts the entire transac-

tion shall charge the above settlement and closing fees to the respective parties.

Marginal release, as noteholder or as attorney in fact for noteholder 15.00

Mechanic's lien, preparation and filing with notices 100.00

Limited Title Certificate (Run-up) 50.00

TAX MATTERS

General Statement:

The total fee for a particular matter shall include charges for time consumed in conferences with clients and in research and shall reflect the novelty and complexity of points of law involved, the tax benefits to the client, and the responsibility involved. The fee shall give effect to a minimum hourly rate charged by the attorney involved.

WILLS AND ESTATE PLANNING

Whenever Federal estate taxes constitute a material factor, the charges to be made for the following instruments should be increased appropriately. Also, additional charges should be made for the time consumed by conferences, preparation of other instruments, supervision of execution of documents, and other duties, with due consideration being given to the importance of the matter, the responsibility involved, and the experience of the attorney.

Wills:

(a) Of basic type, not including future interests, trusts or fiduciary powers 50.00

(b) With trust provisions for family protection and preservation of small estates 150.00

(c) All other wills with trust provisions 200.00

For other trusts—See: Contracts and Agreements: Tax Matters.

Parallel Instruments: Whenever parallel instruments are drawn for the same client or clients, appropriate reductions may be made.

Realty:
Title Examinations (not including closing, settlement, preparation of papers)

Accomac County Bar, (1965)	1% first $10,000 of loan amount or purchase price. 1/2 of 1% on $10-50,000. Over $50,000 by agreement Minimum fee-$25.
Alexandria Arlington, (1962)	3/4 of 1% to $20,000. 1/2 of 1% $20-100,000 Over $100,000 by agreement.
Augusta County Bar, (1968)	1% up to $20,000. 1/2 of 1% $20-50,000. Over $50,000 by agreement. Minimum fee-$35.
Buchanan County Bar, (1967)	1% + $15 up to $30,000. 1/2 of 1% $30-250,000. Over $250,000 by agreement. Minimum fee-$25.
Charlottesville Albemarle, (1960)	1% + $25 to $10,000. 1% + $25 $10-15,000. 1% (not less than $170), $15-30,000. Add 1/2 of 1% on $30-250,000. Over $250,000 by agreement.
Halifax County Bar, (1964)	Detailed schedule set forth
Harrisonburg Rockingham, (1964)	1% + $35 up to $15,000. 1/2 of 1% $15-100,000. Over $100,000 by agreement.
Hopewell Bar, (1967)	1% up to $15,000. 1/2 of 1% $15-250,000. Over $250,000 by agreement. Minimum fee -$35
Lee County Bar, (1968)	Detailed schedule set forth
Lynchburg Bar, (1965)	1% up to $10,000. 1/2 of 1% $10-100,000. 1/4 of 1% over $100,000. Minimum fee-$50.
Mecklenburg County Bar, (1965)	Detailed schedule set forth
Radford Floyd Montgomery, (1966)	Same as State Bar
Newport News Bar, (1968)	1% up to $50,000. 1/2 of 1% $50-250,000. Over $250,000 by agreement. Minimum fee-$75.
Norfolk Portsmouth, (1968)	Same as Newport News
Northern Neck Bar, (1964)	Same as State Bar except amounts under $5,000
Richmond Bar, (1969)	1% up to $25,000. 1/2 of 1% $25-100,000. 1/4 of 1% $100,000-$250,000. Over $250,000 by agreement. Minimum fee-$75.
Pittsylvania County Bar, (1966)	Detailed schedule set forth
Roanoke Bar, (1968)	Same as Newport News. Minimum fee-$5.
Russell County Bar, (1968)	1% up to $25,000. 1/2 of 1% $25-100,000. Over $100,000 by agreement Minimum fee-$50.
Thirteenth Circuit, (1964)	Same as State Bar except amounts under $5,000. Minimum fee-$25.
Williamsburg Bar, (1965)	Same as Newport News. Minimum fee-$50.
Winchester Frederick, (1965)	1% up to $10,000. 1/2 of 1% over $10,000. Minimum fee-$25.
Virginia State Bar, (1962)	1% first $30,000 of loan amount or purchase price. 1/2 of 1% loan amount or purchase price from $30-250,000. Over $250,000 by agreement. Minimum fee-$50.
Recommended Revision, (1969)	Adopt Newport News Schedule

[Exhibit 28]

THE FAIRFAX COUNTY BAR ASSOCIATION

MINIMUM FEE SCHEDULE

Effective Date
MAY 1, 1962

PUBLISHED AND SUPPLIED
WITH THE
COMPLIMENTS OF THE MICHIE COMPANY

STATEMENT OF PURPOSES

The applicable canons of professional ethics lay down the standards for determining a reasonable fee for a lawyer to charge. A minimum fee schedule does not purport to fix a reasonable fee under all circumstances. As the name implies, a minimum fee schedule indicates a minimum fee, on the assumption of an ordinary transaction with a minimum of complicating circumstances, as well as a minimum of time and responsibility on the part of the lawyer.

The Virginia State Bar Committee on Legal Ethics, in Opinion 98 dated June 1, 1960, has ruled with reference to minimum fee schedules, as follows:

"We fully approve the recital in Canon 12 concerning minimum fee schedules that 'no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee'. We also are of the opinion that each lawyer has both a right and an ethical duty to charge a fee lower than that recited in a minimum fee schedule where the time required for the particular service, and its value, are themselves minimal, or where the poverty of a client, or other proper ethical consideration justifies such lower charge.

"However, this is to be distinguished from the situation existing where a lawyer, purely for his own advancement, intentionally and regularly bills less than the customary charges of the bar for similar services as reflected in a schedule of suggested minimum fees. Where the motive prompting the lawyer to repeatedly charge less is to increase his business with resulting personal gain, it becomes a form of solicitation contrary to Canon 27 and also a violation of Canon 7, which forbids the efforts of one lawyer to encroach upon the employment of another. To ignore such schedules under these circumstances has no ethical justification and deserves censure."

More recently, in December, 1961, the American Bar Association Committee on Professional Ethics handed down an opinion to the same effect, which is summarized in the American Bar News dated December 15, 1961, as follows:

"Fee Cutting 'Evils' Cited: In the new opinion (No. 302) the Committee said the establishment of such fee schedules by bar associations is a 'thoroughly laudable activity,' and that 'evils of

fee cutting ought to be apparent to all members of the bar.' It added that Canon 12 admonishes lawyers neither to overestimate nor undervalue their services, and observed that lawyers should not be put in the position of bidding competitively for clients.

"'It is proper for the profession to combat such evils by suggested or recommended minimum fee schedules and other practices which have a tendency to discourage the rendering of services for inadequate compensation,' the opinion said in part. 'Direct or indirect advertising, by whatever means, that a lawyer habitually charges less than reasonable or minimum fees would, of course, be objectionable.'

"While fee schedules are not alone controlling, 'it is equally true that the habitual charging of fees less than those established in suggested or recommended minimum fee schedules . . . may be evidence of unethical conduct, and the Committee accordingly so holds, anything to the contrary in Opinion 190 being hereby overruled, the new opinion concluded. Opinion 190 was dated 1939."

The adoption of this minimum fee schedule by the Association is part and parcel of its determination to enhance the prestige of the Bar. With that end in view, the recommended fees listed in this schedule are to be taken as a conscientious effort to show lawyers in their true perspective of dignity, training and integrity.

Nothing in this schedule is intended to conflict with local, State, or Federal authority regulating compensation of attorneys in those cases in which attorney's fees for legal services are controlled by State or Federal regulation.

VIRGINIA STATE BAR

Canons of Professional Ethics

(194 Va. cxliii)

FIXING THE AMOUNT OF THE FEE — In determining fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans, without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to properly conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

In determining fees, it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

CONTINGENT FEES — Contingent fees, where sanctioned by

law, should be under the supervision of the Court, in order that clients may be protected from unjust charges.

DIVISION OF FEES—No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.

3% of next $75,000.00
2% of balance

In no event shall the fee for full administration be less than $250.00.

In those cases wherein the attorney performs services for the heirs of the estate he should charge that heir or heirs a fee based upon an appropriate hourly rate or in the discretion of the attorney a fee based on the schedule set forth above. The service herein contemplated would include collecting insurance proceeds which were not a part of the estate and such other matters or services not chargeable to the estate.

REALTY

(The following applies to those counties or cities hereafter adopting comparable fee schedules. In real estate matters, the subject of which is property in counties or cities other than those mentioned, the attorney should employ as nearly as possible the fee schedule employed in that jurisdiction.)

PURCHASERS' CHARGES:

Title examination: 60-year examination

Amount*

A. $1.00 to $20,000.00—¾ of 1%.

B. $20,001.00 to $100,000.00—½ of 1% (over $100,000.00 fee shall be individually set but not less than fee charged on $100,000.00).

C. Certificate of title—In those cases in which the attorney issues a certificate of title he shall charge an appropriate fee.

D. Closing or settlement fee—$25.00.

*(Amount as here defined means sale price in the case of a sale or loan amount in the case of a refinance.)

E. Limited title certificate or bring down:

Your association strongly recommends against the use of any limited title certificates based on a search for less than the customary period of time. However, should the client

The above fees are the minimum. Increases should be made whenever the amount involved, responsibility assumed, the difficulty of the legal problem encountered, or the time or procedures required are more than the minimum.

insist upon such a limited title or bring down, he should be made aware of the hazards involved and the title report or certificate clearly marked in such manner as to emphasize its limitations.

In such cases the fee shall be ½ of the fee charged under the schedule set forth in paragraphs A, B, C, & D above.

F. Refinancing bring down:

In those instances where an attorney is called upon to issue his certificate for the purpose of refinancing and he was the attorney who examined the title and issued the most recent certificate, the minimum fee shall be $50.00.

G. Preparation of title insurance application ..... $ 20.00

H. Preparation of deed of trust and note 25.00

If more than one note, then there shall be an additional charge of $1.50 per note for each additional note.

Preparation of deed of trust and note shall mean all types of deeds of trust and notes including preparation of construction, permanent, or construction permanent loan, deeds of trust and notes.

I. In those instances where an attorney is called upon to draw a deed of trust and note and to record the same without title examination or certification, a closing or settlement fee should be charged.

Example: Preparation of deed of trust and note .. $ 25.00
Closing and recordation 25.00

Total $ 50.00

J. Deed of subordination ..... $ 25.00

K. Escrows: In those instances when the settling attorney is called upon to hold an amount of money in escrow pending the completion of a house, repairs to be made, or the happening of any condi-

The above fees are the minimum. Increases should be made whenever the amount involved, responsibility assumed, the difficulty of the legal problem encountered, or the time or procedures required are more than the minimum.

tion, he shall make an appropriate charge for any legal instruments drawn or services performed.

SELLERS' CHARGES:

A. Preparation of usual or simple deed of bargain and sale ..... $ 20.00 25.00

B. Preparation of complex deed of bargain and sale shall be charged for on the basis of the appropriate hourly rate for time consumed, but in no case should the fee be less than ..... $ 20.00 25.00

C. Settlement fee (usual transaction) ..... $ 25.00

Explanation: This fee is charged for preparation of settlement statement, computation of amounts due to and from seller and disbursement of proceeds of sale on behalf of the seller.

D. Settlement fee (complex transaction)

A fee shall be charged on the basis of time consumed and the complexities involved, but in no case shall the fee be less than ..... $ 25.00

Note: In those cases where the property is free and clear and the seller's attorney furnishes the deed, the settling attorney shall make no settlement charges to the seller. In all other cases the attorney who conducts the settlement shall charge the settlement fee. If the seller has additional legal representation, such representation shall be charged for by the attorney so representing the seller and shall not in any way affect the fees charged by the settling attorney.

E. Preparation of deed of release ..... $ 15.00 20.00 25.00

F. Trustee fee (unless otherwise stated by trustee) per trustee ..... $ 5.00 7.50

G. Marginal release ..... each $ 10.00

The above fees are the minimum. Increases should be made whenever the amount involved, responsibility assumed, the difficulty of the legal problem encountered, or the time or procedures required are more than the minimum.

[EXHIBIT 29]

MINIMUM FEE SCHEDULE

THE ALEXANDRIA BAR ASSOCIATION
THE ARLINGTON BAR ASSOCIATION
THE FAIRFAX BAR ASSOCIATION
THE LOUDOUN BAR ASSOCIATION

The following schedule was adopted by each of the above Bar Associations. The schedule is the same for each Bar Association except where noted to the contrary.
Effective date:

The Alexandria Bar Association — July 1, 1969
The Arlington Bar Association — July 8, 1969
The Fairfax Bar Association — June 12, 1969
The Loudoun Bar Association — July 21, 1969

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WITH THE
COMPLIMENTS OF THE MICHIE COMPANY

STATEMENT OF PURPOSES

The applicable canons of professional ethics established the standards for determining a reasonable fee which a lawyer should charge in a given case. The purpose of a minimum fee schedule is not to fix a reasonable fee under all circumstances but is, as the name implies; a suggested minimum fee for the average case. A minimum fee schedule is based on the assumption of an ordinary transaction with a minimum of complicating circumstances as well as a minimum of time and responsibility on the part of the lawyer. It does not profess to set a fee in given cases but is suggested as a guideline.

This schedule of proposed minimum fees is advisory only and is intended to be applied as a guide in determining the conduct of the local bar as to what should be charged as a minimum under the circumstances outlined above. In all cases, the individual lawyer has the responsibility of determining a proper fee under all circumstances. There is no intention to require that the individual lawyer should use this schedule as a means of evading his ultimate responsibility to fix a fair and reasonable fee considering all of the circumstances of a particular case.

As a caveat it should be observed that the Virginia State Bar Committee on Legal Ethics, in Opinion 98 rendered June 1, 1960, ruled that a lawyer who intentionally and regularly charges less than the customary charges of the Bar for similar services as reflected in a schedule of suggested minimum fees for the purpose of increasing his business, with resulting personal gain, violates the Canons of Ethics in that his actions constitute a form of solicitation. Thus consistent and intentional violation of the suggested minimum fee schedule for the purpose of increasing business can, under given circumstances, constitute solicitation.

With these above considerations in mind, it should be realized that the schedule does not prohibit a lawyer from rendering legal services without charge or for less than the minimum charges specified herein to charitable or religious

associations, to persons who would otherwise lack protection of their legal rights, or for any other proper ethical consideration which justifies the fee in a particular case. Solicitation thus is determined by the particular circumstances involved, but can exist from a repeated course of action by attorneys who fit within the purview of Opinion 98 specified herein. It is strongly recommended that all lawyers read Opinion 98.

As a parallel consideration, it is just as improper for a lawyer to imply to clients or prospective clients that another lawyer who charges more than the minimum fees specified in this schedule is acting improperly. To do so would be to intimate what is not true. This is not a schedule of usual, regular or maximum fees and to state otherwise or publicly criticize lawyers who charge more than the suggested fees herein might in itself be evidence of solicitation on the part of any lawyer making such a suggestion.

The adoption of this schedule by the Bar Association is a public pronouncement of its determination to enhance the prestige of the Bar. With that end in view the recommended fees listed in this schedule are to be taken as a conscientious effort to show lawyers in their true perspective of dignity, training and integrity. Each lawyer must establish his own fees and the suggested minimum fee schedule set forth herein is to be used by lawyers as a guideline in appropriate cases. This document is not intended and should never be used to replace the individual discretion of attorneys to set their fees depending upon the particular circumstances of each particular case.

* * *

ministrative services as co-fiduciary and is also entitled to compensation for legal services rendered by him to the estate. Where his legal services are general representation of the estate, the attorney shall be compensated in accordance with the appropriate foregoing schedules.

REAL ESTATE

Title Examination: 60-Year Examination, including Certificate of Title

(a) 1% of the first $50,000.00 of the loan amount or purchase price, whichever is greater, with a minimum of $100.00.

(b) ½ of 1% of the amount of loan or purchase price, whichever is greater, from $50,000.00 to $100,000.00.

(c) ¼ of 1% of the loan amount or purchase price, whichever is greater, from $100,000.00 to $1,000,000.00.

(d) Over $1,000,000.00 of loan amount or purchase price, whichever is greater, by negotiation.

(e) A minimum of $25.00 shall be charged for each additional chain of title.

(f) As a minimum, developers of subdivisions should be charged a fee based on one-half (½) of the fee in accordance with the schedule set forth above. For the purpose of computing the fee, the amount shall be the sale price of the tract of land or lot at the time of the purchase. Upon payment of the fee so computed, the developer, in the discretion of the attorney, shall not be charged any further fee for title examinations, but shall be charged for each service performed thereafter in accordance with the schedule applicable to all other clients.

(g) Limited title certificate and bring down:
Your association strongly recommends against the use of any limited title certificates based on a search for less than the customary period of time. However, should the client insist upon such a limited title or bring down, he should be made aware of the hazards involved and the title report or certificate clearly marked in such a manner as to emphasize its limitations.
In such cases the fee shall be ½ of the fee charged under the schedule set forth in paragraphs (a), (b), (c), and (d) above.

(h) Refinancing bring down:
In those instances where an attorney is called upon to issue his certificate for the purpose of refinancing and he was the attorney who examined the title and issued the most recent certificate, the minimum fee shall be $75.00.

(i) Construction loans when periodically title is run to date. For each report ..... $ 25.00

Preparation of Title Insurance Application 25.00

Preparation of Deed of Trust and Note 30.00

If more than one note, then there shall be an additional charge of $2.00 per note for each additional note.
Preparation of deed of trust and note shall mean all types of deeds of trust and notes, including preparation of construction, permanent, or construction permanent loan, deeds of trust and notes.
In those instances where an attorney is called upon to draw a deed of trust and note to record the same without title examination or

certification, a closing or settlement fee should be charged.

Example: Preparation of deed of trust and note ..... $ 30.00
Closing and recordation 30.00

Total $ 60.00

Deed of Subordination ..... $ 30.00

Escrows:

In those instances when the settling attorney is called upon to hold an amount of money in escrow pending the completion of a house, repairs to be made, or the happening of any condition, he shall make an appropriate charge for any legal instruments drawn or services performed.

Representing Seller or Purchaser at Settlement in Another Attorney's Office 75.00

Closing or Settlement Fee 30.00

This fee is charged both to the seller and the buyer for preparation of settlement statement, time spent at closing and for disbursement of funds.

Add $5.00 for each trust paid off or assumed as to seller and $5.00 for each trust placed or assumed by buyer.

For a complex transaction the settlement fee shall be increased accordingly. The settlement fee shall be charged by the firm or attorney holding settlement whether or not seller or buyer are independently represented at settlement.

Preparation of Deed of Bargain and Sale 30.00

Preparation of Deed of Release:

(a) Full deed of release 20.00
(b) Partial deed of release 25.00

Trustee Fee (per Trustee) 7.50

Marginal Release (each) 15.00

Marginal release shall include partial or full release and a fee shall be charged for each of such releases.

TAX MATTERS

The fee in tax matters shall give effect to the appropriate minimum hourly rate depending upon the education, experience and professional standing of the lawyer in tax matters. The total fee for a particular matter shall include charges for time consumed in conferences with clients, accounting and legal representatives of clients, investigation, research and other preparation and shall reflect the novelty and complexity of points of law involved, the tax benefits to the client, and the responsibility involved.

The following minimum fees are suggested as a guide for the type of work specified:

(a) Obtaining formal revenue ruling ..... $ 500.00*
(b) Preparation of Federal Estate Tax return (including routine conference with auditing agent) 275.00*
(c) Preparation of Virginia Inheritance Tax return 125.00*
(d) Preparation of Federal Gift Tax return 60.00
(e) Preparation of State of Virginia Gift Tax return 60.00
(f) Preparation of State and Federal Gift Tax returns 100.00
(g) Preparation of a Qualified Pension or Profit Sharing Plan 1,000.00

(*) Only applicable if the attorney is not compensated under the Schedule of Minimum Fees of Probate and Administration.

Attorneys should not enter into wholly contingent fee arrangements without first providing the client with an

EXHIBIT 30

OPINION No. 98

JUNE 1, 1960

Subject:

Effect of "minimum fee schedule" adopted by a bar association.

Inquiries:

A lawyer, engaged in practice in a city where the local bar association has adopted a schedule of minimum fees to be charged for certain legal services, has referred to this Committee the following questions:

1. May a lawyer set his fees at sums less than charges suggested by a "schedule of minimum fees" adopted by his local bar association?

2. May the lawyer repeatedly charge such smaller fees?

It is important to observe that the inquiring lawyer states that his local association has adopted the schedule as a suggestion to its members, and has not undertaken to make its observance obligatory.

Opinion:

These inquiries are controlled by Canon 12 of the Canons of Professional Ethics. After reciting that in determining a fee, a lawyer may consider several influencing factors, one of which concerns charges customarily made by others for similar services, the Canon continues:

> "* * * No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

"In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee."

It follows that normally a lawyer may properly set his fee at a sum less than that suggested by a locally approved minimum fee schedule where, as hereafter stated, such charge appears justified.

We fully approve the recital in Canon 12 concerning minimum fee schedules that "no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee." We also are of the opinion that each lawyer has both a right and an ethical duty to charge a fee lower than that recited in a minimum fee schedule where the time required for the particular service, and its value, are themselves minimal, or where the poverty of a client, or other proper ethical consideration justifies such lower charge.

However, this is to be distinguished from the situation existing where a lawyer, purely for his own advancement, intentionally and regularly bills less than the customary charges of the bar for similar services as reflected in a schedule of suggested minimum fees. Where the motive prompting the lawyer to repeatedly charge less is to increase his practice with resulting personal gain, it becomes a form of solicitation contrary to Canon 27 and also a violation of Canon 7, which forbids the efforts of one lawyer to encroach upon the employment of another. To ignore such schedules under these circumstances has no ethical justification and deserves censure.

EXHIBIT 31

VIRGINIA STATE BAR
COMMITTEE ON LEGAL ETHICS
OPINION NO. 170

May 28, 1971

Subject: Minimum Fee Schedule adopted by local bar Associations.

Inquiry: Does the Legal Ethics Committee adopt formally ABA Opinion 323 and does the Committee affirm the statements set forth in Legal Ethics Opinion 98 of this Committee?

ABA Formal Opinion 323 holds that minimum fee schedules can only be suggested or recommended and cannot be made obligatory, but that such minimum fee schedule is *one* element along with the other elements stated in Canon 12 and DR 2-106(B), which a lawyer should consider in determining a proper fee. The ABA opinion also holds that if a lawyer wantonly ignores the customary charges for similar services in his community in fixing his own fees, then he is failing to take into account one element which both Canon 12 and DR-106(B) say should be considered and if it is established through extrinsic evidence that he is doing this for unethical purposes, then all of this evidence taken together *may* establish unethical conduct. The ABA opinion concludes by stating that the Committee "has no hesitancy in holding that mere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action. There are too many other elements to be considered (five under Canon 12, seven under DR 2-106) which might justify departure from the fee schedule."

Your Committee agrees that minimum fee schedules ca - not be made obligatory and that such schedules are but o e element to be considered along with those set forth in Can 1 12 and DR 2-106(B) in determining a proper fee.

Your Committee disagrees with that part of the AB formal opinion 323 that holds that mere failure to follow minimum fee schedule, even where habitual, cannot, stan - ing alone and absent evidence of misconduct, afford a bas s for disciplinary action. It is the opinion of this Committe that evidence that an attorney *habitually* charges less tha the suggested minimum fee schedule adopted by his loc l bar Association, raises a presumption that such lawyer s guilty of misconduct and requires the lawyer to produc evidence that such charges are not made for the purpose soliciting business but because the elements set forth i Canon 12 and DR 2-106 justify departure from the sug - gested minimum fee schedule.

This Committee reaffirms the statements contained i Virginia State Bar Legal Ethics Opinion 98.

The member of the Bar requesting this opinion is entitle to note an appeal to the Council within ten days from th date of mailing. This opinion will be presented to th Council at its next meeting on June 10, 1971.

/s/ N. S. Clifton

N. Samuel Clifton
Executive Director

May 28, 1971

EXHIBIT 36

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D. C.

(Seal Omitted)

Address Reply to the Division Indicated
Refer to Initials and Number
LL:RLW:LB
60-360-0

November 24, 1961

Robert A. McGinnis, Esquire
McGinnis, Berg, Shadyac and Nolan
2014 16th Street, N.
Arlington, Virginia

Dear Mr. McGinnis:

This is in reference to your letter of October 12, 1961, in which, as Chairman of a committee to study the advisability of the Arlington County Bar Association's adoption of a proposed or suggested minimum fee schedule, you requested the advice of the Antitrust Division as to whether or not the adoption of such a fee schedule would violate the federal antitrust laws.

The Antitrust Division has never taken the position in the past that advisory minimum fee schedules established by Bar Association were subject to prosecution under the federal antitrust laws. It should be noted, however, that the posture of the Division in these matters was based primarily upon the presence of the following factors:

1. The activities of the local Bar Associations were not "in commerce" and did not appear to have a significant "affect" [sic] upon interstate commerce; and

2. The fee schedules established were not agreed upon as the amounts to be charged, but were advisory only and not mandatory or binding upon either the members of the profession or the Association concerned.

With respect to the latter, it would appear that certain canons of the established canons of ethics require that the individual lawyer retain responsibility for the establishment of his own fees and retain the freedom to make appropriate charges where the usual fees are not appropriate.

I hope that this may be of assistance to you.

Sincerely yours,

Lee Loevinger
Assistant Attorney General
Antitrust Division

by /s/ Robert L. Wright
Robert L. Wright
First Assistant

[Exhibit 37]

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

[SEAL]

WHO:LB
60-360-0

May 19, 1965

Mr. Hugh C. Cregger, Jr.
President
Arlington County Bar Association
2054 - 14th Street, North
Arlington, Virginia

Dear Mr. Cregger:

The Department has been receiving complaints about agreed-upon, "suggested", minimum fees to be charged by lawyers. We would appreciate the opportunity of discussing the Arlington County Bar Association schedule with you personally, and informally.

Your cooperation is greatly appreciated.

Sincerely yours,

WILLIAM H. ORRICK, JR.
Assistant Attorney General
Antitrust Division

By /s/ Lewis Bernstein
Chief
Special Litigation Section

[Exhibit 38]

May 26, 1965

Mr. Lewis Bernstein
Chief, Special Litigation Section
Antitrust Division
United States Department of Justice
Washington, D.C. 20530

Re: WHO:LB
60-360-0

Dear Mr. Bernstein:

Reference is made to your letter of May 19th last addressed to the undersigned as President of the Arlington County Bar Association.

I will be most happy to meet with you at any time at your convenience, and if you will have your secretary call me, I will be glad to arrange an appointment for both myself and Mr. Dave Kinney, Vice President of the Bar Association, to meet with you at your office.

Very truly yours,

Hugh C. Cregger, Jr.

HCC:emm

[Exhibit 39]

June 14, 1965

Mr. Lewis Bernstein
Chief, Special Litigation Section
Antitrust Division
United States Department of Justice
Washington, D.C. 20530

Re: WHO:LB
60-360-0

Dear Mr. Bernstein:

I very much appreciated meeting with you to discuss the complaints you have received concerning this Association's fee schedule publication. As I explained to you, while the publication has been distributed to members of this Association, appropriate language was contained within the publication stating that it was not meant to establish fees for lawyers but merely to be considered as one of the criteria that the lawyer himself should consider in setting his fees.

After discussing the problem with you, in light of antitrust statutes, I have taken steps to again call to the attention of each member of the Association that any publication regarding what other lawyers might charge is not binding in any way and that each lawyer, being a member of a profession, must establish his own fees based on considerations of time, experience, etc.

The Association will, through its standing committees, take additional action to clarify this matter. This cannot be done until the Fall as it will require action of the Association, and we will not be actively meeting during the Summer months. I shall keep you advised of the measures taken by this Association to correct any misunderstanding that the individual members might have.

Very truly yours,

Hugh C. Cregger, Jr., President

HCC:emm

EXHIBIT 40

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C. 20530

(Seal Omitted)

Address Reply to the Division Indicated
Refer to Initials and Number
DFT:LB
60-360-0

July 8, 1965

Mr. Hugh C. Cregger, Jr.
President, Arlington County
Bar Association
Court House
Arlington, Virginia

Dear Mr. Cregger:

This acknowledges receipt of your letter of June 14, 1965 in which you indicate the position of the Arlington County Bar Association towards minimum fee schedules.

We note that in conformance with our recent discussion you have informed each member of the Association that any published schedule is not binding in any way and that each lawyer should establish his own fees based on considerations of time, experience, etc. We understand that after this matter has been discussed by the Association and

its committees this Fall you will advise us of any further measures taken by the Association.

Sincerely yours,

Donald F. Turner
Acting Assistant Attorney General
Antitrust Division

By /s/ Lewis Bernstein
Lewis Bernstein
Chief
Special Litigation Section

[Exhibit 41]

August 18, 1965

Mr. Lewis Bernstein
Chief, Special Litigation Section
Antitrust Division
United States Department of Justice
Washington, D.C. 20530

Re: WHO:LB
60-360-0

Dear Mr. Bernstein:

I am enclosing herewith a copy of a letter that I have caused to be mailed to each of the approximately 235 members of this Bar Association.

As I have previously stated to you, I feel that each individual attorney was aware that the final responsibility for setting fees belong to the individual attorney but if there has been any misunderstanding I feel that this letter will have dispelled the same.

I shall keep you advised as to further steps taken by the Bar Association during the fall meetings.

Very truly yours,

Hugh C. Cregger, Jr.,
President, Arlington County Bar Association

HCC:scp
Enclosure

[Exhibit 42]

ARLINGTON COUNTY BAR ASSOCIATION
COURT HOUSE
ARLINGTON, VIRGINIA

TO: MEMBERS OF THE ARLINGTON COUNTY BAR ASSOCIATION

As President of the Association, I would like to call each individual attorney's attention to a very important matter concerning the Bar Association's fee schedule guide –

This publication of suggested fees is advisory only and is intended to be applied as a guide as to what should be charged. The individual lawyer has the responsibility of determining what is a proper fee under all circumstances. The Bar publication is only one criteria to be used along with all other matters in determining what fee should be charged. In this connection, I would like to set out once again an excerpt from the Canons of Professional Ethics of the Virginia State Bar:

"In determining the amount of the fee it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to properly conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation

that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service."

Very truly yours,

/s/ Hugh C. Cregger, Jr.
President, Arlington County Bar Association

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA - ALEXANDRIA DIVISION

[Title omitted in printing]

EXCERPTS FROM REPORTER'S TRANSCRIPT

[Tr. 20]***

BY MR. BOOKER:

Q. Colonel McKenna, from what Law School did you graduate?

A. George Washington University.

Q. Have you engaged in the private practice of law at all since your graduation?

[Tr. 21]

A. No, I have not.

Q. Have you established an office?

A. No, I have not.

Q. Have you ever conducted an examination of a parcel of real estate in Virginia?

A. Yes, I have.

Q. In what instance?

A. My own, as a part of a student project while I was in the law school.

Q. Have you ever done it professionally?

A. I have not.

Q. Who determined the method of sampling which you used in preparing Exhibits 43 and 44 to which you have just testified?

A. Plaintiffs' attorney.

Q. Do you know the basis upon which that sample was calculated?

A. The only thing I know is some conjecture that I went through with Plaintiffs' attorney. I have no reason to know what decisions forced the methodology that was given to me point-blank that I would do a –

Q. Do you have any independent knowledge or background which would indicate whether that was a fair or an unfair sampling?

A. Oh, no, your Honor, I do not.

[Tr. 22]

Q. And do you know what universe was defined?

A. I don't – you will have to explain the word, "universe."

Q. Are you familiar with the use of the word "universe," in sampling techniques?

A. I am not.

Q. When you went through and determined who the beneficiary was, was the beneficiary in the out-of-state transaction so denominated?

A. In most instances, in the deed, in the beginning of the deed, there would be party of the first part, second part and third part indicated as a beneficiary. Otherwise, the great proportion of the savings and loan or mortgage company beneficiaries would be indicated as the people who were secured on the note and their location on the trust.

Q. Did you find any deeds of trust of the Prudential Insurance Company?

A. Prudential Insurance Company?

Q. Yes.

A. I don't recall offhand.

Q. Did you find any deeds of trust where the beneficiary was any insurance company?

A. I don't specifically recall, except that I believe the Equitable Assurance Company is on one of them. I think this was up in New York.

[Tr. 23]

Q. Do you know, of your own knowledge, whether Equitable Assurance Society has a local office in Northern Virginia to handle its transactions?

A. I do not.

Q. Was there anything on the Deed Book which would indicate whether there was a local office which was involved in the financing of the property?

A. As a rule, no. There were a minor number of instances. I take, for example, one; there is a company in Maryland, A.E. Langvoigt – I believe the spelling to be. When I began the survey or the study, the company and the individual were listed in Maryland. Later on, and I can't tell you where the dividing line is, payments were being made to an address in either Arlington or Alexandria.

In that case, that person was – remained listed as a red or out-of-state beneficiary.

Q. Was there any way you could tell from looking at a deed of trust which had an out-of-state beneficiary whether the financing of the transaction had been handled in a Virginia office or not?

A. There was not.

Q. Did you observe beside any of the deeds of trust a notation as to where the deed of trust was to be mailed after it was recorded?

A. I know that they are there from having seen some

[Tr. 24]

of them usually mailed back to a law firm, but I can't specifically say whether they were mailed out of state or in state.

Q. Did you consider the place to which the deed of trust was to be mailed in making the calculations which you show on Exhibits 43, 44 and 45?

A. They were not my instructions.

Q. And you did not do so?

A. I did not.

Q. Did you make the independent evaluation as to whether the deeds of trust covered real estate which was for commercial or industrial purposes and real estate which was for residential purposes?

A. I did not.

Q. What was the purpose of the $100,000 breakdown?

A. I do not know, of my own knowledge. I can guess.

Q. But you do not know?

A. I do not know.

Q. And so, you could not tell us which of these transactions are commercial and which of these are residential?

A. No, I cannot.

* * * * *

[Tr. 26] ***

BY MR. DUNN:

Q. State your name for the Court, please.

A. Sam Clifton.

Q. What is your occupation, Mr. Clifton?

A. I am the Executive Director of the Virginia State Bar.

Q. Would you explain briefly to the Court your educational background and professional background?

A. I have a B.S. in Commerce from the University of Virginia, 1952; L.L.B., George Washington University, 1959. I was admitted to the Bar in February 1960.

Q. You mean the Bar of Virginia?

A. Bar of Virginia, also a member of the District of Columbia Bar by the reciprocity provision. I practiced Law in Alexandria and around Northern Virginia from 1960 to 1962. I was employed by the American Bar Association as Director

[Tr. 27]

of their Economics Department from 1963 until 1966. I came to the Virginia State Bar in 1966. I was Assistant Executive Director until 1969, and I have been Executive Director since 1969 until the present time.

Q. What would be a general description of your duties, Mr. Clifton, as Executive Director of the State Bar?

A. I have overall responsibility for administering the affairs of the State Bar under the general policies and guidelines established by the Council of the Virginia State Bar, which operates under rules of the Virginia Supreme Court.

I am the Chief Executive, you might say, of the organization. I have the overall responsibility for administration of the staff, for overseeing the operation of the State Bar, internal and external.

Our principal function is to process complaints regarding the conduct, professional conduct, of members of the Virginia State Bar and to oversee the practice of law generally within the rules established by the Supreme Court and the Council actions as manifested in opinions that are adopted by the Council with regard to the conduct of Virginia State Bar members.

We are a unified Bar. By that I mean that all lawyers who practice in Virginia are required to belong to the Virginia State Bar and must maintain their standing with the Virginia State Bar in order to practice Law.

[Tr. 28]

Q. In your duties as Executive Director, do you have occasion to meet on a regular basis with all the committees of the State Bar?

A. I do.

Q. With specific reference to the Ethics Committee, do you meet, as a general rule, regularly with that Committee?

A. I do.

Q. Could you explain the organizational setup which the Virginia State Bar has, in terms of receiving complaints about attorneys?

A. Well, the Bar was established for disciplinary purposes, or the disciplinary enforcement is administered through the operation of ten District Committees, which correspond with the ten Congressional districts, and for each Congressional district or each district, a committee of 7 or 14 members is appointed, depending on the volume of complaints or the geographical size of the district.

Where there is a large geographic district, the committee is of 14, sits in panels. Where the volume of complaints

is high, the panel of 14 sits in separate panels so that each panel has a reasonable workload.

The complaints come from many sources. Many come directly to the State Bar office there in Richmond. I get them from – directly, as the Director of the State Bar, I

[Tr. 29]

get them from the Governor's office, from the Attorney General's office. I get them from Washington, from the U.S. Attorney General, from the President, various sources – from people who are disgruntled in one way or another – or the American Bar Association.

Another way in which complaints are received are by the District Committees, themselves, and that comes about generally by the person who wants to complain finding out for himself how the system operates, and he finds out who the chairman of a particular District Committee is, and he forwards a complaint to the chairman.

One way or another the chairman of the committee takes action on the complaint, whether it comes in through the State Bar office, or to the chairman or a member of the District Committee, personally.

I send all the complaints to the appropriate District Committee, and that's where the disciplinary action originates, if disciplinary action is indeed taken.

The chairman of the District Committee assigns the complaint, if it is in proper form – and by proper form, I mean that the complaint is required to be in writing and notarized – and when it is in that form – we don't accept oral complaints. When it is in proper form, I send it to the chairman of the District Committee. He assigns it to a member of the District Committee to conduct a

[Tr. 30]

preliminary investigation to determine the nature and extent of the complaint, and to determine whether there is probable cause that a disciplinary violation has occurred.

This is done by the District Committee member talking with the complainant to define clearly what the nature of the complaint is, and if the committee member determines that there is – appears to him to be probable cause, he reports back to the full committee on his finding and recommends that additional investigation be undertaken or that a formal complaint be issued and a formal hearing set.

Then, the formal hearing, if that comes about, is done through a procedure established by – through the Court whereby the committee hears all the evidence involved and from that hearing, there may come a petition to reprimand an attorney or to disbar or suspend him.

That is kind of an over-view of how the system operates.

Q. Other than a conduit for forwarding complaints to the committee, what role does your office or any member of your office take in this problem?

A. From time to time, if the complaint necessitates somewhat extensive investigation, and we do have a special counsel, James Wrenn, whose responsibility is principally to work with the ten District Committees, and assist them

[Tr. 31]

in investigations.

Prior to Mr. Wrenn's employment by the Bar, we had on occasion employed private detectives and accountants to review books, to conduct investigations on an ad hoc basis, when the situation seemed to require it.

This is done when the District Committee feels that a particular complaint requires knowledge, expertise, investigative service that is more than can reasonably be handled by a volunteer attorney, who works on the District Committee without compensation.

Q. The special counsel does not, then, investigate all complaints?

A. No, only the ones that are involved.

Q. It would be fair to say that the number of complaints he investigates is a fairly small percentage of the total?

A. A small percentage.

Q. Does the local committee have any investigative force whatsoever?

A. No.

Q. Any employees of their own or of the State Bar?

A. No.

Q. Is there any type of investigative group which might be fairly described as attempting to ferret out instances of violations of the canons?

[Tr. 32]

A. No.

Q. Would it be fair to say that you only take investigative action upon receiving a complaint in the natural order of things?

A. Only when we receive a complaint.

Q. Would you explain, again in an over-view form, exactly what the State Bar does, and its committees do,

with respect to the rendering of official opinions on ethical matters?

A. Well, the rules provide that any member of the State Bar can request and advise an opinion regarding a contemplated course of action. When a request does come in, it is generally in the letter form, setting forth a set of facts which the requesting attorney would like an opinion from the Ethics Committee as to the propriety of conduct contemplated in a factual situation.

The Ethics Committee will either respond informally, if it is a specific set of facts or set of circumstances that are rather peculiar, have no widespread application. That is an informal opinion. It is just a particular response to a particular question.

We have the formal opinion. The formal opinion is rendered in cases where the factual situation set forth is one of wide application and of concern to the lawyers generally, and the Ethics Committee will write an opinion

[Tr. 33]

on the propriety of a proposed course of conduct, and that opinion is submitted to the Council, under State law, which meets normally twice a year, and the Council will approve or disapprove or refer the opinion back to the Ethics Committee, and the Council, by rule of Court, has the authority to adopt these ethics opinions which construe the Code of Professional Responsibility, under which lawyers are bound and are supposed to practice their profession.

Q. Going back for just a moment to the committees which consider complaints, do you have any records in your office of the complaints which are received – and I

am speaking now not of the complaints that you receive initially in your office, but of complaints that are being handled by the local committees?

A. Normally, I receive – I ask all the District Committees to send me copies of the minutes of their meetings, and a docket or agenda of the matters under consideration, and I am advised – provided they pay attention to me when I tell them to send me copies of the minutes – they normally do. I keep a finger on what goes on in the various District Committees.

Q. To your knowledge, has there been received in your office the complaint with regard to an attorney charging less than the minimal fee schedule?

A. Not since I have been with the Bar, and that is

[Tr. 34]

December 1966.

Q. Would that be true with regard to any area of the State, not only Northern Virginia?

A. Of all areas.

* * * * *

BY MR. BOOKER:

Q. Mr. Clifton, have you caused a collection of all

[Tr. 35]

the complaints or disciplinary actions taken since the integration of the Bar in 1938 to date to be assembled and produced for counsel for the Plaintiffs?

A. I produced several documents and data in response to interrogatories that were served on me.

Q. Did that include all records of disciplinary actions or complaints against attorneys for violation of Canon 12 for the period of 1938 to date?

A. For Canon 12, right.

Q. Did you, yourself, review that?

A. Oh, yes.

Q. And did you find anywhere in them any evidence, from the time of the integration of the Bar in 1938 to date, that any disciplinary action had ever been taken against an attorney for failure to adhere to a minimum fee schedule?

A. Nothing that was indicated in the records, no.

Q. And did you find any complaint against an attorney for that reason?

A. Nothing in the records, the files.

Q. Has the Virginia State Bar, from time to time, assembled the various advisory minimum fee schedules published by the local Bar Association?

A. Oh, yes, we have.

Q. And what have you done with that?

A. Well, the first compilation we made – I was not

[Tr. 36]

with the Bar at the time – was 1962, and then in 1969, I prepared a compilation of local Bar Association schedules.

Q. What was done with that after it was compiled?

A. It was sent to the members of the Bar as a statistical analysis of fee schedules – those that I received, anyway. I think there were 21 or 22.

Q. Were the fee schedules from each Bar Association identical?

A. Oh, no.

Q. Did you observe a variance from location to location from time to time?

A. Varying very much

* * * * *

BY MR. DUNN:

[Tr. 37]

Q. Would you state your name for the Court?

A. My name is John D. Conner.

Q. And you are an attorney, Mr. Conner?

A. Yes, I am.

Q. What Bars are you a member of?

A. I am a member of the Bar of the District of Columbia, having been admitted in 1938, and a member of the Bar of the Supreme Court of the United States.

Q. Have you been active during your period of practice in the District of Columbia in your local Bar organization?

A. Yes, I have, to some extent. I have practiced in the District of Columbia since my admission to the Bar in 1938, except for a period of time during the Second World War.

I have served as Chairman of the Committee on Administrative Law – the Section on Administrative Law of the District of Columbia Bar Association. I have served on its Board of Directors. I have served on its Ethics Committee. I have served on the Committee on Judicial Selections of the Federal Bar Association, the District of Columbia Chapter.

I am presently Chairman of the Committee on Economics of Law Practice of the D.C. Bar Association.

Q. And have you been active as well in the American

[Tr. 38]

Bar Association?

A. Yes, I have, to some extent.

Q. Will you relate your activities in the American Bar Association?

A. I have served as a member and as Chairman of the Committee on Economics of the Law Practice of the American Bar Association. This is a standing committee of the American Bar Association. Its primary function is to attempt to increase the efficiency of members of the Bar through continuing education in the use of staff, devices, equipment that will enable them to better perform their services, through the adoption of office systems and records that will enable them to determine just and adequate, equitable fees, and by developing program material, sponsoring programs of that nature, engage in these continuing education activities.

Q. And how many years have you been a member of that – or were you a member of that committee?

A. I was a member of that committee for approximately six or seven years, and was Chairman of the committee, I believe, for a period of four years.

I am presently Chairman of the Research Review Committee of the Fellows of the American Bar Foundation, a member of the Research Committee of the American Bar Foundation.

[Tr. 39]

Q. Have you authored any publications with regard to fees and billing practices?

A. Yes. I am the author of the chapter on fees and billing practices that appears in the Lawyer's Handbook, a publication of the American Bar Association, that has been quite widely distributed, I believe some 100,000 copies, to members of the Bar.

Q. Have you played any part in the organization of any courses in this area?

A. Yes. I have the primary responsibility in planning and conducting the First National Conference on Law Office Management, sponsored by the American Bar Association.

I have been a participant in the subsequent second, third and fourth conferences, national conferences on law office management, also sponsored by the American Bar Association.

I recently was a participant in a Conference on Law Office Management, sponsored jointly by the American Bar Association and the Canadian Bar Association.

* * * *

[Tr. 40] * * *

BY MR. DUNN:

Q. With respect to your service in these capacities, Mr. Conner, have you had occasion to meet with state and local officials of Bar Associations, in terms of discussing fees and billing practices?

A. Yes, I had occasion during the time that I served on the Committee on Economics of Law Practice to meet

with groups of attorneys in numerous states and localities to explore various problems in the law office management field. I would guess probably some tweenty states or so, and many localities.

Q. As a result of your activities in these areas, do you feel that you are familiar with the ethical principles involved in billing and fee practices and with specific regard to minimum fee schedules?

A. I believe so.

* * * * *

[Tr. 42] * * *

BY MR. DUNN:

Q. Mr. Conner, would you discuss, in general detail, the origin of the fee schedules and their use in the organized Bar?

A. I will and, in doing so, I hope that counsel or certainly, the Court, if it feels that I am going into more detail than is relevant to the case – because I am not familiar with the issues in the case – I hope that I will be advised of that.

The use of minimum fee schedules is intimately tied to the responsibility of the attorney to determine a

[Tr. 43]

fee that is adequate and just, both to the client and to the attorney. This revolves around the use of, originally, of Canon 12 of the Canons of Ethics of the American Bar Association, which in turn was adopted by certainly the majority of the states.

Canon 12 was originally issued or adopted by the American Bar Association in 1908. It set forth six factors to be

considered by an attorney in arriving at a just and fair fee. Those factors were the time, labor, and skill, the loss of business employment because of antagonisms or conflicts involved in the case, the customary charges of the Bar for similar services, the amount involved in benefit to the client, the contingency or certainty of compensation, and whether the employment was casual or continuing.

In the Canon, as it was originally adopted in 1908 there was no reference to the use of minimum fee schedules. In May, 1930, however, the Committee on Ethics of the American Bar Association was asked to rule on the use of a minimum fee schedule by an attorney in arriving at the fee.

The opinion of the Ethics Commitee in substance was that an attorney's adherence to an obligatory fee schedule which is applicable to every case of the same nature would violate Canon 12.

[Tr. 44]

Again, in July, 1973, in Opinion 171, the Committee on Ethics, again, held that no attorney should permit himself to be controlled by an obligatory fee schedule, nor should any Bar Association undertake to impose such a restriction on him.

However, almost at the same time, Canon 12 was amended by the American Bar Association to add this additional paragraph:

"In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby, or to follow it as his sole guide in determining the amount of his fee."

At about this same time, the Courts began, on occasion, to be concerned or had to consider the question as to whether it was proper for attorneys to use minimum fees.

On two occasions, in the 1930s, Courts did hold that it was proper for attorneys to refer to minimum fee schedules in arriving at their fees. The two cases that were decided in the 1930s –

* * * *

[Tr. 45] * * *

BY MR. DUNN:

Q. Mr. Conner, if you will, direct your attention more specifically, then, to the reasons for use of the minimum fee schedule.

A. All right. After Canon 12 was amended to specifically recognize the use of minimum fee schedules, the American Bar Association in 1963 published a publication, the manual for assistance of state and local Bar committees, in evolving and adopting minimum fee schedules.

In the foreword it pointed out, specifically, that, "Such schedules should not be considered as mandatory as the final determination of fees, must always be made in the light of relevant conditions prescribed by the Canons of Ethics, and especially Canon 12."

At that time, there had been approximately 600 localities, local Bar Associations, that had adopted minimum fee schedules and some twenty or so states at that time had adopted them.

[Tr. 46]

In 1961, the Committee on Ethics of the American Bar Association, in Opinion 302, held that the habitual charging

of fees less than those established by a minimum fee schedule, or the charging of such fees without proper justification, may be evidence of unethical conduct.

In 1962, the American Bar Association appointed a special committee on the evaluation of ethical standards. This committee made a thorough study of the existing Canons of Ethics of the American Bar Association and, eventually, evolved a new Code of Professional Responsibility, which was adopted then by House of Delegates in 1970.

It has restated, in substance, the Canons of Ethics, and as to Canon 12, it has been incorporated, in substance, in two parts, the first, that is designated as Ethical Consideration 218, which states, "Suggested fee schedules and economic reports and state and local Bar Associations provide some guidance on the subject of reasonable fees," and refers to earlier opinions of the Ethics Committee of the American Bar Association, holding, "That no attorney should be bound by such schedules but should consider them as advisory only."

At the same time, in what is referred to as Disciplinary Rule 2.106, Paragraph B, it states eight factors to be considered by an attorney in arriving at a figure, in place of the six that were set forth in Canon 12, and these

[Tr. 47]

six – or the eight factors that are specified in the new disciplinary rule are these:

"The time and labor involved, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;

"The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

"Three, the fee customarily charged by the locality for similar legal services;

"The amount involved and the results obtained;

"Five, the time limitations imposed by the client or by the circumstances;

"Six, the nature and length of the professional relationship with a client;

"Seven, the experience, reputation and ability of the lawyer or lawyers performing the services; and,

"Eight, whether the fee is fixed or contingent."

In substance it maintains – retains the time, labor and skill factor, the fees customarily charged by the Bar, and recognizes the use of minimum fee schedules as a factor or as an aid in arriving at a just and proper fee.

Q. Did you have occasion to compare the Virginia Code of Professional Responsibility with the American Bar

[Tr. 48]

Association's?

A. I have in these –

Q. With regard to these two?

A. Yes. Since its adoption in 1970, the Code of Professional Responsibility has been adopted by some fifty states, I believe, including Virginia.

I have compared the provisions of the Code of Professional Responsibility of Virginia in the two parts that I have referred to, and they are identical.

Q. All right.

A. I believe that concludes my discussion of that.

Q. O.K. Then, would you at this time explain in what way the minimum fee schedule is considered to be a tool in terms of the Code of Professional Responsibility? What is the position of the Bar with regard to the reason for its use?

A. One of the factors to be considered by an attorney in arriving at his fee, both under Canon 12, under Ethical Consideration 218 and Disciplinary Rule 106 is the question of fees customarily charged by lawyers in the locality for similar service.

The minimum fee schedules, I think – well, the use of minimum fee schedules have been recognized by both Canon 12 and by the new rules as a tool to be used by the attorney in applying this factor.

[Tr. 49]

It has, also, I think, some application in applying the time, labor and skill factor, advising an attorney as to when applying the time, labor and skill factor, what that factor is, as applied by other members of the Bar.

It has been my observation, in discussing this question with attorneys, that the primary value of minimum fee schedules, particularly, or first to the younger attorney who is just starting to practice, does not have the expertise as possibly the older members of the Bar, by reducing these intangible factors to a more tangible factor as to what the result would be as applied to a particular case.

It has been my experience, also, that it is of value to clients to give them some guide as to whether fees that they are being charged are equitable and proper.

I have found it, also, to be of value when an attorney gets into a field of practice where he is not particularly

competent, does not have a basis of judging how long it should take him to perform a particular task. It provides him, in such cases, with a guide that he can apply in determining whether a fee that he might arrive at, say, solely on the basis of time, is or is not an equitable fee.

Q. Apart from being useful to the older attorneys in that regard, is that of any benefit to the client?

[Tr. 50]

A. Yes, I think that it is. Again, it gives the client some basis for judging the reasonableness of the fee that he or she is being charged in a particular case.

Q. With regard to 2.106 would it be fair to say that the purpose of this canon is to establish a fee which is both reasonable to the attorney in terms of his being adequately compensated, and reasonable to the client in terms of receiving what he paid for?

A. Yes, I think so. Other factors of the Code of Ethics to which I have not referred specifically provide that it is unethical for a lawyer to charge more than a reasonable fee. At the same time, others – other parts provide that it is unethical for an attorney to charge less than a reasonable fee under the circumstances, again considering all of the factors specified in 2.106, such as the ability of the client to pay, the value to the client, and things of that nature.

So, it is just a guide to be used in bringing these intangible factors to a more tangible result, and the use of them by the Bar Association, we have always advocated that the minimum fee schedule should be freely made available to the client, so they can be used by the client as well as by the attorney in arriving at the judgment as to whether or not a particular fee is reasonable.

Q. How is it to the client's detriment and to the

[Tr. 51]

public's detriment if an attorney charges a fee lower than that which would adequately compensate him?

A. I think there are a number of reasons why that would be detrimental to the client or to the public.

First, one of the factors that I have encountered in my discussion of these problems with members of the Bar is the practice of some attorneys in localities of doing work for a client, say, a real estate developer – doing title work for him at no fee, on the basis of what I would refer to as a tie-in understanding that all of the closings, then, of the purchases will be referred to him.

I think that is – the use of a proper fee schedule in a case like that would clearly be to the benefit of the client, because it prevents the client, the individual purchaser, subsequently, from having to pay for services that someone else should have paid for, by the use of the tie-in arrangement.

I think, also, that the factor must be considered that, if the Bar is to perform its services in a reasonable manner, it must be compensated. The lawyer, individual lawyer, must be compensated for his services to the extent that he can afford a proper library, proper equipment, proper facilities, employ a staff that will enable him to perform his services most beneficially, to engage in continuing education, and things of that nature. A reasonable

[Tr. 52]

amount of income or proper income is necessary for that.

My experience also has indicated that the cases where a complaint is most likely to be filed against a member of

the Bar, for a misappropriation of client's funds or situations of that nature, are instances where the attorney has not been able to perform his services efficiently, possibly has not known how to arrive at a just and equitable fee, and the pressure of financial circumstances, then, eventually, resulted in the misappropriation of client funds.

Q. Finally, I would like to direct your attentioin to one other technical aspect of minimum fee schedules, and that is where the attorney charges less than the minimum fee schedule, and I am speaking now particularly with reference to ABA Opinion 3.3 and the Opinions 98 and 170 of Virginia.

Would you discuss your understanding of the reason behind that opinion and what the substance of that opinion is?

* * * * *

[Tr. 53] * * *

A. This opinion, I believe, did two things or enunciated two principles. First, it was rendered shortly after the adoption of the new Code of Professional Responsibility in 1970.

It first reaffirmed the principle that the new Code of Professional Responsibility recognized the use of the minimum fee schedule as a proper aid or guideline to

[Tr. 54]

an attorney at arriving at a figure. It re-emphasized the point –

* * * * *

BY MR. DUNN:

Q. The Court is aware of the holding. If you would, explain the position of the Bar with regard to it.

A. Based on conversations that I have had with individuals that have appeared before the Committee on Ethics, the type of situation that was responsible for the statement in the opinion that the systematic charging of less than minimum fees may be considered evidence of unprofessional conduct, were the types of situations to which I referred a while ago, where an attorney will perform legal services for one client at no cost, or at very low cost on the basis of a tie-in understanding that he will be referred business by others, and based upon my discussions with members of the Bar, it was that type of situation that was responsible for the original Opinion 3.02 and the restatement or clarification in 3.23.

* * * * *

[Tr. 55] * * *

BY MR. BOOKER:

Q. Mr. Conner, is a lawyer permitted to advertise?

A. No.

Q. Why is that?

A. Because of the concept that law is a personal service to be rendered on what you might refer to as a quality basis. It is a personal service rather than a commodity that is to be sold, and the concept that advertising for clients is inconsistent with this basic concept that it is a personal service rather than a commodity.

Q. Is Law regarded as a learned profession rather than a trade?

A. Yes.

Q. Is there any connection between advisory minimum fee schedules and the prohibition against an attorney's advertising?

A. Yes. The opinions have pointed out the relevance that the charging, habitual charging, of less than an equitable fee or fees customarily charged is for the purpose

[Tr. 56]

of soliciting clients, which is the equivalent of advertising of the services.

Q. Are you familiar with the expressions, champerty and maintenance?

A. Yes, sir.

Q. Can you tell us generally what they cover?

A. It is my understanding that they cover the concept where an attorney deliberately promotes litigation for his own personal gain.

Q. Is that prohibited?

A. Yes.

Q. Is there any relationship between the prohibition against champerty and maintenance and minimum fee schedules?

A. I personally do not see a direct connection, nor do I recall discussion in the relevant opinions of the Committee on Ethics on it. I personally had not thought of it in those terms.

Q. Based on your knowledge and understanding of the profession of Law, is there a public interest in maintaining high professional standards of ethics and of education?

A. Yes, sir.

Q. Is there any relationship between minimum fee schedules and that principle?

A. Yes, I think there is. As I referred to in my direct testimony, it has been my experience that it is

[Tr. 57]

usually in those cases of the attorneys who, for one reason or another, do not know how to charge proper and adequate fees. It is the attorney who cannot afford the continuing education, the time to keep abreast of professional developments, to acquire the equipment that will enable him to properly perform his services, so I think that there is a direct connection.

Q. In your opinion and based on your experience, is an attorney who does not have time for continuing, time and funds for continuing legal education, for adequate staff, able to render the services to the community at large which the Bar expects?

A. No, I do not think so. I do not think that he can, and in my work with the American Bar Association, we have conducted surveys of lawyers and lawyers' practices in quite a number of states, and we have seen the direct relationship in these surveys to the fee practices – and by the fee practices, I mean the practice of an individual attorney in keeping accurate time records, accurate description of the services that he has performed, and his income, and the time that he devotes to continuing education, Bar work, and work of that nature. So, I think there is a direct connection.

MR. BOOKER: Thank you, sir. I have no further questions.

* * * * *

[Tr. 62] * * *

BY MR. BOOKER:

Q. Mr. Goldfarb, please state your name and residence address.

A. Lewis H. Goldfarb, 12110 Quorn Lane, Reston, Virgina.

Q. Are you the Plaintiff and a representative of the class in this action?

A. That is correct.

Q. What is your educational background?

A. I received a B.A. from New York University in 1966, and a J.D. from Rutgers University in 1969.

Q. Are you a member of the Bar of any state?

A. I have been admitted to the District of Columbia

[Tr. 63]

Bar, 1969.

Q. By whom are you employed and in what position?

A. I am a trial attorney for the Federal Trade Commission, Bureau of Consumer Protection.

Q. Did you have an occasion to purchase a residence in Virginia in 1971?

A. I did.

Q. Where were you living at the time you decided to purchase another residence?

A. I am sorry. The purchase was made in 1972.

Q. Did you have occasion to look for a new house in Virginia in 1971?

A. Yes.

Q. Where were you living at the time?

A. In Arlington.

Q. Is that located in Virginia?

A. Yes.

Q. Where did you go to look for a new house?

A. Various places in Northern Virginia.

Q. Did you reach a conclusion as to where you wished to make a purchase?

A. Yes.

Q. Where did you in fact make a purchase?

A. In Reston, Virginia.

Q. Can you tell us the name of the person from whom

[Tr. 64]

you purchased the property?

A. The seller was Fox Vale Construction Company.

Q. Where is Fox Vale Construction Company?

A. Located in Reston, Virginia.

Q. Did Fox Vale handle the sale of the property directly?

A. Their agent, Wellborn Realty, did.

Q. Is Wellborn the exclusive agent for Fox Vale?

A. I am not sure of that. They are the on-site agents.

Q. Where is Wellborn located?

A. Reston.

* * * * *

BY MR. BOOKER:

Q. How did you decide to finance the property?

A. Through a bank.

Q. What bank or institution did you choose?

A. Northern Virginia Savings and Loan.

[Tr. 65] * * *

BY MR. BOOKER:

Q. When did you first find out that you wished to have a title examination of this property made?

A. The seller requires a title examination, and I was later informed that it would be advisable for the purchaser also to have his interest insured.

Q. Do you mean Fox Vale required you to have a title examination?

[Tr. 66]

A. I am sorry. The seller – the lender –. I am sorry. The lender required title insurance which required a title examination.

Q. Is this the first home you have ever owned?

A. Yes.

Q. Did you not know independently, from your legal background, that a title examination was a good idea?

A. Title examination?

Q. Yes.

A. If one wanted title insurance, I knew they had to have a title examination. Title insurance, I was told, was a good idea.

Q. But even if you did not want title insurance, did you not expect to have the title to the property examined?

A. I hadn't thought about it.

Q. You entered into the transaction for the sale of the property without concern whether you had title to the property examined, is that correct?

A. I entered into the contract to purchase the house without considering whether I was going to have title insurance or title examination.

Q. And had the lender not required a title examination, you would not have had the title examined, is that correct?

A. No; I probably would have had.

[Tr. 67]

Q. Could you tell us when in time the awareness came to you that you should have the title examined?

A. Between the time of signing the contract and the time of the closing on the house.

Q. Why did you decide, after you had contracted to purchase the house but before the closing took place, that you wanted to have the title examined?

A. I had some equity in the house and I wanted to make sure that there were no adverse claims against my equity.

Q. So you regarded this as an important aspect of your purchase of the house, did you not?

A. Yes.

Q. So even if the lender had not required title insurance, it is your present view that you would have wanted the title examined?

A. I would have wanted title insurance.

Q. In order to protect your equity in the house?

A. That's right.

Q. And your equity was in the magnitude of $39,000, is that correct?

A. I believe that is in the record.

Q. And did you secure title insurance because of your equity as well as the lender's interest in the property?

[Tr. 68]

A. I was required to cover the lender's interest and I obtained it to cover my own, as well.

Q. So the portion of the title insurance which was required was only the lender's, and the rest you took because you wanted it yourself?

A. Yes.

Q. When you signed the contract, did it provide who would handle the closing of the transaction?

A. Yes.

Q. Were you aware of that at the time you signed the contract?

A. No, I wasn't.

Q. Did you read over the contract before you signed it?

A. I read it over but the name of the attorney was in the same size and type print as the rest of the contract was, and I just – that wasn't an important clause at the time I read the contract. I don't recall being aware that the attorney was designated in the contract at the time I signed it.

Q. Do you mean that the name of the attorney was typed in after you signed it?

A. No, I don't recall being aware that the name of the attorney was in there. It was not typed in afterwards, but having read the contract, I do not recall being aware

[Tr. 69]

at that time that the attorney was designated to handle the closing.

Q. But, in fact, the attorney's name was typed in at the time you signed the contract?

A. The attorney's name was in the contract at the time I signed it.

Q. When did it come to your attention that that attorney would handle the closing?

A. When I realized what I would be paying for title insurance and I thought it was unreasonable, and I thought that since I was obtaining the loan and I was obtaining the title insurance, that I should be able to obtain my own attorney to perform that service.

Q. Did you have any discussion with the attorney designated in the contract as to whether you wished him to handle the closing or not?

A. I sent a letter to that attorney indicating my reservations about him handling it for the reasons that I have just given.

He responded saying that the seller requires that all closing – words to the effect the seller requires that all closings on this cluster of houses be handled by this law firm.

Q. And did you then, thereafter, attempt to find another attorney to handle this closing for you?

[Tr. 70]

A. Yes, I did.

Q. And did you succeed in finding someone else to handle the closing?

A. No.

Q. How many law firms did you consider?

A. Approximately 35, over a period of about six weeks. I originally contacted eight by letter and I got – received two responses, so I sent out fifteen to seventeen more after that.

Q. Did any of those attorneys disclose a specific charge or a fee to you for handling the closing?

A. My letter indicated what the fee for my closing would be, and I asked the attorney or the law firm whether their fees would vary. Nineteen replied by letter indicating that their fee was the same as the Bar Association fee schedule.

Q. Did any of them state a specific monetary figure?

A. No. I don't recall, but I don't think so.

Q. When you were looking for other attorneys who might handle the examination of the title, what did you expect to do about the attorney whose name was already prepared in the contract which was signed?

A. I felt that I was not legally bound to have that attorney represent my interests as well as the seller's, and I thought that I could prevail upon him to

[Tr. 71]

allow me to have my own attorney do the settlement, if I so desired.

Q. And so, after you consulted the other attorneys, you decided to stick with the man whose name was in the contract?

A. I was unable to find an attorney who would charge less, which was the main basis that I was seeking other attorneys.

Q. And so, under those circumstances, you were

satisfied with the attorney who was provided in the contract which you had previously signed?

A. Yes.

Q. Did the lending institution from whom you were borrowing a portion of the money require that any specific attorney handle the title examination?

A. No.

Q. You were free to choose whoever you wanted to, were you not?

A. Yes.

Q. Did you have anything to do with the recording of the deed?

A. Did I participate in the recording of the deed?

Q. Yes.

A. The actual recording? No.

Q. Did you participate in the closing transaction,

[Tr. 72]

except to be there as the purchaser?

A. No.

Q. Once the transaction was closed, did you receive a copy of the deed?

A. Yes.

Q. And from whom did you receive a copy of the deed?

A. A. Burke Hertz.

Q. Was he the attorney who represented you at the closing?

A. He was the attorney who handled the closing, representing both parties, I presume.

Q. Have you ever examined a real estate parcel in Virginia?

A. A parcel or the deed records?

Q. The deed records or in any manner?

A. No.

Q. Do you regard yourself as qualified to do so?

A. I have never done it so I can't say that I am qualified.

Q. I show you a letter, which was introduced in your deposition, dated December 22, 1971, from Mr. King, to you, and ask you whether you remember receiving this letter?

A. Yes, I received it.

Q. Is that one of the letters you referred to when you said that all the attorneys who wrote back to you said

[Tr. 73]

they would charge the minimum fee schedule?

A. This was one of the letters that was included in the responses that I received.

Q. And you categorized that as a response that the attorney would charge the minimum fee schedule?

A. I didn't categorize it as one in which the attorney would charge less than the fee schedule. It clearly says here – makes no reference to the fee schedule. He indicates that he does not quote fees by mail and that you had to make an appointment with somebody in his firm who would discuss the matter further.

Q. So it is not an accurate summary of your testimony to say that all the attorneys who responded to you

said that they would charge the minimum fee schedule, is that correct?

A. That is not an accurate summary.

Q. Some said they would and some didn't say, is that correct?

* * * * *

A. I interpreted this response as one in which the

[Tr. 74]

law firm would not go below the fee schedules, since all other 18 responses indicated what they would charge. I thought there was no bar to a law firm doing so, so I construed this as meaning that the firm would not charge below that schedule.

Q. Did you make any appointment to talk with any member of that firm?

A. No.

Q. Did you ever consult with the firm of Boothe, Prichard and Dudley?

A. No.

Q. Have you ever read your title insurance policy?

A. Yes.

Q. Do you know what it protects you against, in general?

A. Any adverse claims of record. There was a list of about ten or twelve exceptions to it. Those include mostly claims that would not be recorded in the land records, various other liens and tax claims, prior to my purchase.

Q. Do you know what liability, if any, the examining attorney has assumed under the title insurance policy?

A. I have been led to believe that, as a general rule–

Q. Do you know, from your own knowledge?

[Tr. 75]

A. Well, my knowledge is based upon what I have been told, and I have been told that it is very infrequent that an attorney ever is held liable for an inaccurate title search.

Q. There is nothing in the title insurance policy which provides one way or the other about that, is there?

A. No.

* * * * *

F. SHEILD McCANDLISH

was called as a witness by counsel for Defendant Fairfax Bar Association and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOOKER:

Q. Please state your name and residence address.

A. F. Sheild McCandlish, 3806 Lakeview Terrace, Falls Church, Virginia.

[Tr. 76]

Q. What is your occupation?

A. I am a lawyer.

Q. With what firm do you practice?

A. Boothe, Prichard and Dudley in Fairfax.

Q. What is your professional background?

A. I graduated from Georgetown Law School in 1947,

and in that year became a member of the Virginia State Bar, and I have been in private practice ever since in Fairfax.

Q. Is your practice concentrated in any particular field?

A. At the present time, and I would say for the past ten or eleven years, it has been specializing in the field of Real Estate Law.

Q. Does your practice encompass the examination of real estate transactions and the handling of real estate closings in Reston, Virginia?

A. Yes, it does.

Q. Can you give us an estimate over the past four years as to the number of such transactions you and your firm have handled in Reston?

A. In Reston, I have examined my files and find that the number of house settlements – actually, transfer of houses from buyer to seller – seller to buyer – have been about 600, a little bit, about 620.

[Tr. 77]

Q. And can you tell us approximately how many transfers there have been in Reston all together, in both those handled by your firm and those handled by others?

A. That is rather difficult. I think that they are in the neighborhood of 3,000.

Q. Are some of those reconveyances?

A. Some of those would be reconveyances.

Q. Do you have any estimate as to the number of original conveyances?

A. In Reston, totally?

Q. Yes.

A. I think, in those four years, there were probably in the neighborhood of 1,800 to 2,000 conveyances.

Q. Of which your firm handled approximately 600?
A. Or a little less than that, because the 619 I mentioned included some reconveyances that we handled.

MR. BOOKER: If your Honor please, in our proposed statement of facts on behalf of the Fairfax Bar Association, Paragraph 34 through 37 describes the steps in a typical real estate settlement and examination of title. That has been prepared with the aid and assistance of Mr. McCandlish.

I understand counsel for the Plaintiffs have agreed as to the accuracy but not the relevancy of those

[Tr. 78]

paragraphs, and rather than have Mr. McCandlish go through those paragraphs one at a time, I propose a stipulation that Paragraphs 34 through 37 of Fairfax's proposed Findings of Fact accurately summarizes the steps in a real estate transaction and examination of title, generally, and in the Reston area particularly.

THE COURT: All right, sir.

MR. MORRISON: Your Honor, may I just make one statement for the record with regard to that?

First, we don't believe that this is relevant at all at this stage of the proceeding, that is the liability as opposed to the damage question, and while we have prepared evidence on the liability question, we will agree these are the statement of facts.

Should we get into the question of damages in this case, we would want to reserve the right, any right to challenge

any of this, but there is no point in doing so now, at this time, your Honor, and with that reservation we have no objection, subject only to relevance grounds.

THE COURT: All right. It has been stipulated, then, that the factual matters contained in proposed stipulations 34 through 37 are correct for the purposes of this hearing?

MR. MORRISON: That is correct. That is the

[Tr. 79]

proposed Finding of Fact and Conclusions of Law.

THE COURT: Of the Defendant Fairfax Bar Association?

MR. MORRISON: That is correct, your Honor, yes, sir.

THE COURT: I will overrule your objection at this time as far as relevancy is concerned.

BY MR. BOOKER:

Q. Mr. McCandlish, in your practice, have you become aware of the recommended minimum fee schedules adopted by the Fairfax Bar Association?
A. Yes, I have.

Q. How did you become aware of them?
A. Well, these schedules were discussed at Bar Association meetings, and I believe they were voted on as to whether or not there should be a suggested fee schedule, and this has been, in several instances, been revised from time to time.

* * * * *

[Tr. 80] * * *

BY MR. BOOKER:

Q. I now show you Exhibits 36, 37, 38, 39, 40, 41 and 42 attached to the stipulation that authenticity, but not the relevance of which has been admitted by the parties, and ask you whether this exchange of correspondence summarizes in substance your understanding between the Department of Justice and Northern Virginia Bar Association?

A. Yes, it does.

MR. BOOKER: If your Honor please, those exhibits have not been admitted in evidence. I now offer them into evidence.

MR. MORRISON: We object, your Honor, on the grounds that it is irrelevant and constitutes opinions of law. Moreover, it involves correspondence between the Arlington County Bar Association, no longer a Defendant in this case, and the Justice Department, and we feel that, in our view, it has no relevance whatsoever in the

[Tr. 81]

action.

THE COURT: What would be the relevance?

MR. BOOKER: If your Honor please, the Defendant Fairfax Bar Association takes the position that the adoption of minimum fee schedules is a reasonable means of handling transactions of this nature. The reasonableness, then, we say is in issue, that the reasonableness is in issue, and that the knowledge of the position taken by the Department of Justice surely is important to the reasonableness of local Bar Associations who promulgate such schedules.

THE COURT: I am not at all sure that reasonableness is in issue, but I am not prepared to rule finally on that at this stage on that basis.

In the event that I ultimately become convinced that reasonableness is in issue, this might bear on that. To that extent, and that extent only, I will receive them in evidence. For that purpose only, I will receive them in evidence.

MR. BOOKER: That is the purpose for which they are offered, your Honor. We don't expect them to be binding on the Court as to the law involved.

THE COURT: All right. Objection overruled.

BY MR. BOOKER:

Q. During your own practice, have you had occasion

[Tr. 82]

to make inquiries of others as to the position of the Department of Justice on minimum fee schedules?

A. At one time, as Chairman of the Real Estate Committee of the Fairfax County Bar, the question was discussed, and an attorney named Michael Horwatt raised the question and I asked him if he would look into it, and he did, and he came back with the same kind of answers indicated in those letters, that it was not regarded as a violation.

Q. What purpose, if any, does your firm make of the minimum fee schedules in real estate transactions?

A. It is used as a guide. I have made studies of costs and expenses of handling these transactions. The schedule

is departed from frequently if there are any special circumstances that would warrant it. It is used, however, as a guide in fixing the fee in an ordinary case, in many ordinary cases.

Q. Is it your firm's policy to adhere strictly to the minimum fee schedules in settling real estate transactions in Reston?

A. No, I would think that – I have been over every file for the four years. I didn't understand the exact date, but I went over files from February 22, 1968, to February 22, 1972, a four-year period. As I say, during that time we settled 619 cases, to my best count.

[Tr. 83]

Now, the accuracy of my figures here may not be 100 percent. It was a long, arduous task to pull each file and make a determination on this, but that is the figure that I think would be 95 or better percent accurate, and of those 619 cases, I would say that in 393 of them we did not charge the actual fee set out by the minimum fee schedule, and that means, in that case, they would be lower.

There were a few cases, I am sure, where we charged more than the minimum fee schedule, but they were very few.

Q. Can you describe the circumstances and categories in which you did not charge the minimum fee schedule in those, approximately, 400 where you did not charge the minimum fee schedule?

A. About half of these were this type of thing, which I think everybody is familiar with by now, and that is that the fee schedule or the rate that would have been

dictated or would have been suggested by the fee schedule was applied to the loan amount rather than the purchase price.

In other words, if it was a $30,000 house and a $20,000 loan, the title examination fee would have been put at $200 and then, after settlement, if the purchaser wanted a title policy in the name of the owner, then some

[Tr. 84]

additional amount would be charged that would have been based on the purchase price, but I would say that that would be true of about 200 cases, out of the 619, that this lower amount was charged and the total fee to us was less on that account.

As a matter of fact, I made for the one year only – I didn't get through the whole thing, but for 1968, I totaled up all the fees that we got in the Reston settlements and it came out that the purchaser paid an average of $278 per settlement. This would have been substantially under what the minimum fee schedule would dictate or would cite or suggest.

The other kind of deviations were these kind of things. Some special cases where a minister bought a house, I recall, in one of these files, and even though he paid all cash, I think we charged him half of the ordinary charge.

There were cases where Reston, itself, paid the fees, and in those cases, in most of them, I would say, we charged something like one percent of the total purchase price as the total legal fee, and that was it – the buyer-seller combined, that was the fee we charged. That would be in the neighborhood of $125 less than what would have been charged if it had been charged according to the minimum fee schedule.

[Tr. 85]

There are other things such as refinancings and construction loans and things, where – I'm not even sure what the minimum fee schedule says, to be frank about it, but I am sure that we charged them, in many cases, even less than cost to us, simply because of the person.

I recall, for instance, that in, I think it was 1970, when the ceiling was taken off the interest rates. Interest rates went up to around 9 percent in the spring of that year. By that fall, they had gone down, and in those cases – maybe it was 7.5 percent where somebody wanted to refinance and get rid of that high interest rate – we charged a nominal fee to do that, just out of the fact that this just wasn't right for a person to have to go through all that again.

I don't know. There may be some other circumstances but I can't recall any at the moment.

Q. Did you ever have any discussion with any Bar organization or committee relating to your fee schedule or your charges for refinancing?

A. On that particular situation, I did. I told them that this was a situation that I didn't know what they felt about it, but that I was just simply going to charge them a nominal fee as far as title examination was concerned for a $40,000 loan, and the answer came back

[Tr. 86]

that it didn't make any difference, they weren't enforcing it, anyway.

Q. Did anyone ever make a complaint against you or your firm for your fees in connection with refinancing?

A. No.

Q. Have you, yourself, ever served on a District Committee?

A. Yes, I have.

Q. Which committee?

A. It was the Tenth District Committee.

Q. For what period of time, sir?

A. It is a four-year term and I think I was on there roughly from 1964 to 1968. I don't recall the exact dates.

Q. During that period of time, was there ever any complaint to your committee about an attorney who failed to adhere to a minimum fee schedule?

A. No. There was no complaint of any kind and no discussion that I ever heard about it at all.

Q. Did your committee ever take any action against anyone?

A. No, they did not.

Q. What is the purpose of a title examination of a parcel of real estate?

A. Well, it is to determine, of course, if there

[Tr. 87]

are any liens or encumbrances upon the property and the easements or rights-of-way which might make it unfit for the use for which it is purchased, any such thing as that, delinquent taxes, judgments, any kind of a lien.

Q. What process do you consider in establishing your fee for rendering such legal services?

A. Well, I consider several factors. One of them is, of course, the cost to us of rendering the service. As I look

back at it in 1968, the average fees that we got there in Reston, I would say – I don't know if that did anything more than cover the cost. Today, I am sure it wouldn't begin to cover the cost of what it costs to do a settlement there.

So we look at those things and, generally speaking, the customary charges in the community are about right. I feel that in a subdivision, even though the Reston title, itself, is one of the most difficult things that you can encounter, and a vast amount of time, as I think will be set out in those stipulations, is spent every day in just trying to keep up with this thing. There is something over 3,000 entries in the grantor index under the Reston entities that have to be examined some time. They open up a new section and every one of those things has to be looked at.

Those factors are taken into consideration, but

[Tr. 88]

also it is really the only development that we have had a whole lot to do with of any size, except one back in 1950, and based on the fact of doing all this work and keeping this thing up to date, even though it is a mammoth undertaking, it seemed to me we could charge a little less in Reston than we could on the type of work where we are doing random titles. It is for that reason that I felt we were able to charge less than the suggested fee for an ordinary real estate closing in many cases.

Q. Do you attempt to establish an average charge for houses approximately of the same value in the same location?

A. Yes, we do.

Q. Does that necessarily reflect the amount of work involved in each individual title?

A. No, it does not. This can vary greatly and it seems that in this type of practice I don't know of any other way it can be done properly.

I can think of a case this past year where I would imagine that it took maybe 20 hours of my time alone, in addition to 65 hours of a title examiner's time. This kind of case is difficult and it required the drafting of rather sophisticated documents to clear up a title defect. The net result is we got exactly the same fee we would have if we had encountered no trouble, and the point is if everybody pays the same in an average situation, it

[Tr. 89]

doesn't make any difference how difficult or how simple the title is, as a rule, roughly the same amount is charged.

Q. Is there any potential liability to an attorney who examines the title in Reston or in Fairfax County?

A. Yes, I would say there is. The bulk of that kind of liability is in small amounts such as delinquent taxes that are missed or redoing instruments or rerecording, and various things that have to be done over.

Some things can occur, you know, you make a bad mistake and miss something, and we did pay the sum of a $5,000 claim because of something that we had done wrong.

That happens very, very seldom, I am glad to say. It is not the kind of thing I would want to run into very often.

Q. Is it necessary to prepare and file deeds of correction?

A. Yes, it is, and I might also add that we are being sued right now for a half a million dollars on a question of a certificate of title. The case will be heard this month.

Q. When it is necessary for your firm to prepare a

deed of correction or pay taxes you may have missed, or something of that nature, do you go back again to the person who engaged you to examine the title to recover that loss?

[Tr. 90]

A. Absolutely not. That is our responsibility.

Q. Have you made any recent calculations as to what your direct labor charges are for examining typical parcels in Reston? * * * * *

A. Well, now, to bring us somewhat up to date, I would say this – did you ask me for the total settlement or the examination of title?

BY MR. BOOKER:

Q. Well, first, let's take the total settlement.

A. The total settlement costs, I would say, in the year 1971, were in the neighborhood of $310.

Q. Does that include –

A. Now, that does not include – that is only the salaries. That does not include anything for the rent of the building, the telephone or any supplies or anything

[Tr. 91]

else, and that would be the salaries that I would pay.

Q. Does that include anything for your salary or earnings as a supervising partner?

A. No, it does not, or for any partner in the firm. That does not include anything for the partnership.

Q. That is only the direct labor charges with no overhead and no profit and no administrative expenses?

A. That is correct.

Q. When one desires to examine a real estate parcel in Reston, Virginia, where does he go to conduct that examination?

A. He goes to the Clerk's Office of the Circuit Court of Fairfax County in the City of Fairfax.

Q. Is there any other place to which he might usually or regularly want to go to make an examination or a check?

A. Well, as far as the taxes are concerned, he would have to go to the Tower Building there, which is the County office building. It is set apart from the Courthouse. He might have to come to Alexandria to this Court to check bankruptcy records, but that would be very rare.

Q. Is there any reason for him to go out of the State of Virginia?

A. You could conceive of such a reason, I suppose. I don't know that I ever have.

[Tr. 92]

Q. Can you think of any reason to conduct a real estate examination of a title in Fairfax, property located in Fairfax County, why you would need to go outside the State of Virginia to conduct that examination?

A. The only possible reason would be to get some information. For instance, if somebody had died living in the State of Kentucky and you were trying to trace them down or locate an heir or something like that, you might go, but you wouldn't be – well, I suppose if he had a will there, you might want to see what the will said, but on the other hand, the chances are you would write and get a copy of it rather than go there. That is all I can say.

Q. But the record books that you have .o refer to are located in Virginia, are they not?

A. That's right. The record books in Fairfax County, if you have a good title, should be complete in and of themselves so that ycu don't have any missing links in the chain of title, and you can have it all on the records, and if it is not there, then you would have to see to it that it is recorded there.

Q. Is the minimum fee schedule which you have referred to for Fairfax County one that is promulgated nationwide?

A. Not to my knowledge.

[Tr. 93]

Q. What area does that affect?

A. Well, I am really not sure about that. I am sure that it is intended to be used in Fairfax County. The State Bar schedule, I am not sure whether it absolutely parallels it or not. It may be the same figures, but that is not adopted by anybody as far as I know.

Q. In addition to your own firm's nonadherence tc the minimum fee schedule, do you know of your own knowledge whether other firms in Fairfax do not rigorously adhere to the minimum fee schedule?

A. I would say this, that I have seen a number of instances, where I have attended settlements elsewhere, for instance, where they had not followed exactly the minimum fee schedule. I don't know whether that would be their practice because I don't do that very often.

I would say, from hearsay, I have heard that many do not. I have also heard of the – I think they introduced here, about the Arlington Bar and eighteen firms down there. I have never seen that document.

Q. But you know of your own knowledge from other closings you have attended, that it is not always adhered to?

A. Oh, yes.

Q. Are you a member of the Fairfax Bar Association?

A. Yes, I am.

[Tr. 94]

Q. Have you ever served as an officer or a member of the Executive Committee of that Association?

A. I was President of it, I think, in 1964, and I don't know about the Executive Committee. I may have been on it. I guess I was ex officio or something, after being President.

Q. At that time, did the Fairfax Bar Association offer to render legal service to anyone?

A. Not to my knowledge.

Q. Has it ever offered to render legal service to anyone since you have been a member of it?

A. Not that I know of.

* * * * *

[Tr. 105] * * *

BY MR. BOOKER:

Q. Please state your name and residence address.

A. John T. Hazel, Jr., 5117 Brookridge Place, Fairfax, Virginia.

Q. What is your occupation?

A. Attorney.

Q. What is your educational background?

A. College degree and Law School degree.

Q. Are you a member of the Virginia Bar?
A. Yes, sir.

Q. Where do you practice?
A. Fairfax, Virginia.

Q. How long have you been practicing in Fairfax, Virginia?
A. Fifteen years.

Q. Is any portion of your practice devoted to real estate matters?
A. Not a great deal of mine, but some of my firm's practice at this time.

Q. Are you familiar with the minimum fee schedule promulgated by the Fairfax Bar Association?
A. In a very general way.

[Tr. 106]

Q. To what extent, if at all, do you make reference to it in your own practice?
A. In my personal practice, none. In the firm's practice, occasional, if any.

Q. And why is that?

MR. MORRISON: Your Honor, I would object to that question.

THE COURT: What was it?

MR. MORRISON: Why his firm doesn't refer to it.

THE COURT: Objection overruled.

A. Well, I distinguish first between my personal practice in which I, individually, do very little if any real

estate work. In the non-real estate areas, I have never referred to the fee schedule in any way at all.

In the real estate area, in the process of discussions regarding fees in the past ten or twelve years, I imagine I have at least been aware of the fee schedule amount a half a dozen times.

Q. Has your firm adhered to that fee schedule when it has had real estate transactions?

MR. MORRISON: Your Honor, I would object. I think that if they want to ask the witness to testify about

[Tr. 107]

what the firm does on real estate, the partners who are familiar with those matters and work on them should be called. This witness has stated that he is not familiar with real estate matters at all and doesn't do them. I don't think he is a proper witness on that.

A. I don't think that is quite what I said.

THE COURT: Objection overruled.

A. I am familiar with all areas of the firm and have been.

BY MR. BOOKER:

Q. Are you the senior partner in your firm?
A. Yes, I am.

In connection with the real estate, we have occasionally referred to it as a guideline, particularly on isolated – or I would say solely rather than particularly – solely on isolated single lot settlements, which we do not encourage, and which are always a problem because they very frequently cannot be accomplished economically and return a profit.

Q. Have you had occasion to handle the examination of real estate titles or real estate settlements where the seller or the developer paid the cost?

A. We have encouraged that approach in the past two or three years.

Q. Can you tell us how your fee is established under

[Tr. 108]

those circumstances?

A. We review – and I have participated principally in that sort of activity, and I suppose it would be fair to say that it is usually my determination that sets the policy for the firm in those kinds of cases.

We review the project involved, the relationship with the seller and the firm, the type of housing that is involved. For example, a number of our clients, as are many people, many developers in the industry, are terribly concerned these days about the ultimate cost to the consumer of the housing unit involved.

We have three basic types of units that are settling frequently in the County, the single family which, of course, is probably the principal type in number, but in recent years the townhouse and the condominium units. In the townhouse unit, there is usually a homes association. In the condominium, it is under the current Virginia condominium regime.

These latter two are particularly good examples of efforts to reduce the cost of housing to the consumer. We have worked closely with our developer clients in fixing a fee for the entire settlement transaction that is then paid by the seller, and because of certain economies in the sales process and the settlement process, we think

this affords a better opportunity to reduce the ultimate cost

[Tr. 109]

to the consumer than the more conventional division of settlement fees in part by the buyer and in part by the seller, and in keeping with that approach, in each of our negotiations regarding a price to the seller, we have looked at the project, the cost of the project, the selling price of the units, the finance institution that will be involved.

There is a great deal of variety in involvement with the finance institution. Some are very simple to deal with and, therefore, the work required is less. Some are very complicated to deal with and, obviously, we have a great deal more work.

The various Government programs, the FHA and the VA add other work requirements that have a direct bearing on cost.

Actually, the paperwork, as we call it, is a much more relevant matter in a major development settlement situation than the title itself.

Once the title is completed, the title can become relatively routine, and we have attempted to adjust the settlement analysis, the cost analysis, to accommodate what we think are the true cost centers in the settlement process, and they involve the paperwork, the dealing with the purchaser, the actual settlement in the office, the time spent, and so on, and in those situations, in fixing

[Tr. 110]

the price, we have endeavored to compute the time requirement as an area for profit and come up with a figure to the seller that would take care of the entire settlement

transaction, including the financing, the conveyance, and all the matters related to the typical settlement.

That has been the approach we have taken in practically all of our negotiations in the last two years.

* * * * *

[Tr. 111] * * *

BY MR. BOOKER:

Q. Mr. Duvall, please state your name and residence address.

A. Joe Duvall, 5116 Forest Gate Place, Fairfax, Virginia.

Q. What is your occupation?

A. I am a lawyer.

Q. What is your firm name?

A. Duvall, Tate, Bywater and McNamara.

Q. Where do you practice?

A. Fairfax, Arlington, Alexandria. Sometimes I go up in the country.

Q. Are you a member of the Fairfax Bar Association?

A. Yes.

Q. Do you hold any position in the Fairfax Bar

[Tr. 112]

Association?

A. I am the President.

Q. Have you held any position in the past in the Fairfax Bar Association?

A. I was President Elect and I was Chairman of the Courts' Committee and several other committees.

Q. How long have you been a member of the Fairfax Bar Association?

A. Since 1963.

Q. When did you begin to practice in Fairfax?

A. 1963.

Q. What has been your previous legal experience?

A. Well, I was a lawyer for ICC for a year. I had to get out of there and came out here and practiced since May of 1963 up to the present.

Q. Since you have been a member of the Fairfax Bar Association, to your knowledge, has it ever rendered legal service or advice to anyone?

A. No.

Q. Does it now render legal service or advice to anyone?

A. No.

Q. Are you aware of the minimum fee schedule promulgated by the Fairfax Bar Association?

A. Yes.

[Tr. 113]

Q. Did you participate in the preparation of that schedule?

A. No. Well, only to the extent of going to Bar meetings and, you know, when it came up, but no, I didn't.

Q. Based on your experience in Fairfax, what usefulness or value does the minimum fee schedule have?

A. Well, No. 1, a young lawyer comes up, passes the Bar and goes out and hangs up his shingle, it gives him a measuring stick for what to charge for simple wills or various cases that he gets in the office. You know, he is not in with a large firm and so he really doesn't know what to charge. He has no basis. They don't teach them this in law school, and so the minimum fee schedule acts as a guide to him, helps him.

By the same token, we have a lot of Government-type lawyers that, you know, when they retire or moonlight, it gives them a measuring stick by which to go by in order to charge fees.

I know it helped me when I started out in practice, and I know that it helps them.

Q. Do you adhere to the schedule established by the minimum fee schedule now in your own practice?

A. No.

Q. Why is that?

A. Well, because I know what my costs are and I know

[Tr. 114]

what to charge. I mean, I know at least what I think my service is worth and, you know, if they want to pay it, fine. If they don't, there are plenty of other lawyers that they can hire.

Q. Has anyone ever recommended disciplinary action against you, so far as you know, for failure to adhere to the minimum fee schedule?

A. If they did, nobody told me about it.

Q. Is the schedule mandatory, so far as you know?

A. No. It says right in the schedule itself, that it is merely advisory. It is in evidence here.

Q. From what you know of the Fairfax Bar Association and your experience in the area, is it generally regarded by the members of your Association as advisory only?

MR. MORRISON: I object to the question, your Honor.

THE COURT: Objection overruled.

A. Yes. They couldn't get anything else from it. There has never been one person tried, prosecuted, for violating it that I am aware of, and I think the State Bar Association has been in business since – the State Bar has been in business since 1938, and there has never been a case prosecuted by the State Bar for anybody charging consistently less than a minimum fee.

Q. Are you aware of any activity undertaken by the

[Tr. 115]

Fairfax Bar Association, either while you were President or prior to that, in which the Association has attempted to cause its members to adhere to the minimum fee schedule?

A. No.

Q. Are you aware of any activity by the Fairfax Bar Association, either during your Presidency or before that, in which it has attempted to circulate its minimum fee schedule to all members of the Association?

A. No. The minimum fee schedule was made available at the courthouse, and the members knew about it

and any of them that wanted to pick up a copy of it could.

Q. But it was not circulated to the membership at large, however?

A. Not unless you call that circulation.

Q. Insofar as you know, has the Fairfax Bar Association ever agreed or entered into any kind of undertaking or understanding with any other Bar Association about the enforcement of any minimum fee schedules?

A. No.

Q. Does your firm engage in any substantial real estate practice?

A. Well, we don't have any big builders. We do property settlement work, yes. We handle settlements. We don't represent Gulf-Reston or –

Q. In connection with those settlements, what is

[Tr. 116]

the basis for your establishment of your fee?

A. Well, I don't do the settlements. Harlow McNamara does the settlement work in our office, and I know that he takes into consideration the time that it is going to take him to do the title search on the land and to draw the instruments, deeds, deeds of trust, and the time spent in getting the information from the lender and what the lender is going to require, the points, and all of that business; and I know this all goes into what he charges, but I know that we have charged less than the minimum fee schedule and that we have charged more than the minimum fee schedule, and that we are not bound by the minimum fee schedule.

* * * * *

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In The

Supreme Court of the United States

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF RESTON, VIRGINIA HOMEOWNERS,

Petitioners,

v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

MOTION TO DISMISS ON BEHALF OF THE VIRGINIA STATE BAR

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1. **Whether The Action Of The Virginia State Bar, An Administrative Agency Of The Supreme Court Of Virginia, In Distributing Minimum Fee Reports And In Issuing Opinions With Respect To Ethical Conduct Of Attorneys, Constitutes "State Action" Exempt From Federal Antitrust Laws?**

2. **Whether The Virginia State Bar, An Administrative Arm Of The Virginia Supreme Court, Is Immune From Suit On Account Of The Eleventh Amendment Of The United States Constitution?**

STATEMENT OF THE CASE

Respondent, Virginia State Bar, agrees substantially with the statement of the case by the Goldfarbs. To the extent that it disagrees, *e.g.*, with respect to their comparison of the minimum fee reports of the State Bar with the minimum fee schedule of the Fairfax County Bar Association, these matters will be addressed in argument.

Additionally, the following facts are pertinent to a consideration of the nature of the Virginia State Bar, although they are inclusive of some previously stated by petitioners.

The State Bar is an administrative agency of the Supreme Court of Virginia created by the Supreme Court of Virginia pursuant to the laws of Virginia, including § 54-49, Code of Virginia (1950), as amended. The Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operations of the State Bar which are found in §§ II and IV of Part VI of the Rules of the Supreme Court. (Stip. 9; App. A, p. 17[1]).

The powers of the State Bar have been delegated to the council of the State Bar, which is comprised of one or more[2] persons from each judical circuit in Virginia, six persons appointed at large by the Supreme Court of Virginia, and the president, president-elect and immediate past president, all of whom serve as *ex officio* members. (Stip. 10; App. A, pp. 17-18).

Each attorney practicing law in Virginia is required by statute and by court rule to be a member of the State Bar. The State Bar is required by statute and rule to investigate alleged violations of the standards of conduct mandated by the Supreme Court Rules, and to report its findings to a

[1] Since petitioners have set out the stipulations in their brief, respondent will reference that appendix, rather than the record below.

[2] Since the institution of this action, there has been a minor amendment of the Rules.

court of appropriate jurisdiction for further disciplinary proceedings. (Stip. 11; App. A, p. 18).

The Supreme Court has delegated to the State Bar responsibility for investigating complaints of unprofessional conduct of any member of the State Bar. Such investigations are carried out by district committees which are comprised of attorneys. There is such a committee organized in each of the ten congressional districts of Virginia. (Stip. 22; App. A, p. 20).

Pursuant to § 54-52 of the Code, the funds for operation of the State Bar are appropriated from a special fund of the State Treasury by act of the General Assembly. The special fund in the State Treasury consists of fees paid by members of the State Bar, the amounts of which are set, pursuant to statute, by the Supreme Court. (Stip. 12; App. A, p. 18).

The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on matters involving questions of ethics. (Stip. 16; App. A, p. 19). The Supreme Court of Virginia has stated that suggested fee schedules and economic reports of the State Bar and of local bar associations involve questions of ethics. (Stip. 18; App. A, p. 19). The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on questions of ethics, such as Opinions 98 and 170 which relate to minimum fee schedules, and to disseminate minimum fee schedule reports. (Stip. 19; App. A, p. 19).

In 1962 and 1969, attorneys who were members of the State Bar prepared on behalf of the State Bar minimum fee schedule reports. (Stip. 14; App. A, p. 18). Minimum fee schedules of some type are published and circulated in at least thirty-four states and in the District of Columbia either by the voluntary bar or by a counterpart of the State Bar. (Stip. 26; App. A, p. 20).

The State Bar has never received a communication from the respondent local bar association regarding the professional conduct of any member of said association or any member of the State Bar, including failure of such members to follow a minimum fee schedule. (Stip. 24; App. A, p. 20). The State Bar has never received a communication from any person regarding the professional conduct of any member of the State Bar with respect to minimum fee schedules. (Joint Appendix, p. 113). The State Bar has never initiated or participated in any administrative or judicial action against an attorney for failure to adhere to a minimum fee schedule. (Stip. 25; App. A, p. 20).

Virginia attorneys who provided legal services to prospective home buyers in Reston, Virginia, are specifically prohibited by the Code of Professional Responsibility promulgated by the Supreme Court of Virginia from advertising their services or their charges for these services either within or without the State of Virginia. (Stip. 23; App. A, p. 20).

ARGUMENT

A.

State Action

The seminal case with respect to "state action" is *Parker* v. *Brown,* 317 U.S. 341 (1943). The case involved an interpretation of the applicability of the Sherman Act to the actions of a State agency. The following language is instructive:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from

activities directed by its legislature." 317 U.S. at 350-351.

* * *

"There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.'" 317 U.S. at 351.

* * *

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." (Citation omitted.) 317 U.S. at 352.

As far back as 1895, it was ruled that a state was not a "person" who could violate the Sherman Act. *Lowenstein* v. *Evans,* 69 F. 908 (C.C.D.S.C. 1895). This Court subsequent to *Parker* had another opportunity to consider the "state action" exemption to the Sherman Act in *Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), which held that efforts to restrain trade by obtaining passage of laws was "state action" within the meaning of *Parker.* Therein the Court stated:

> ". . . the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where restraint upon trade or monopolization is a result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U.S. at 135-136.

The common thread weaving its way through *Parker* and *Noerr* is that the State cannot be held responsible for a violation of the Sherman Act.

The Court of Appeals applied to the State Bar those guidelines set out in *Parker* to determine whether antitrust immunity has been conferred upon private persons. (497 F.2d 1, 6-12; Pet. Brief, App. B, pp. 6-12). Based upon such analysis, the Court found that the State Bar was exempt. (497 F.2d at 12; Pet. Brief, App. B, p. 12). While the decision was correct, it was not necessary for the Court to undertake such an approach. Since the State Bar is a state agency, the Court should simply have concluded that it was not capable of violating the Sherman Act for the reasons previously stated.

As to this proposition, there is no conflict among the circuits. Petitioners cite two cases for the proposition that governmental officials are not necessarily immune. (Brief, p. 28). Neither, however, are dispositive of the instant case. Both *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), and *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011 (3rd 1971), involved situations where the courts found that no antitrust immunity had been conferred upon private parties. Neither involved findings that the governmental defendants were liable for violation of the Sherman Act, the relief sought here. There is simply no conflict among the federal courts as to the issue that injunctive relief and damages will not issue against a state agency under the Sherman Act.

Moreover, the role of the State Bar has been an extremely minor one in any event. While it published fee reports, this is clearly a very incidental part of the action complained of in that they are not binding, but are mere guidelines for

localities and in fact, were not adopted in their entirety by the Fairfax County Bar Association, even as to the title examination fees.[3] It is further significant that in rendering the opinions complained of and in publishing the minimum fee reports, the State Bar is carrying out its statutory responsibility; it is not acting in a commercial or proprietary capacity.

B.

Sovereign Immunity

The Eleventh Amendment to the Constitution of the United States reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens who are subjects of any foreign state." *U.S. Const. amend. XI*

In *Hans* v. *State of Louisiana*, 134 U.S. 1 (1890), it was held that in the absence of waiver, actions against a state by a fellow citizen were prohibited as well as actions by citizens of different states. An early exception to this rule was created in *Ex Parte Young*, 209 U.S. 123 (1907),

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[3] A comparison of page 11 of the Virginia State Bar minimum fee schedule report of 1969 (Exh. 27; J.A. 70) with page 25 of the Fairfax Bar Association minimum fee schedule of 1969 (Exh. 29; J.A. 84) reveals (a) that there is a minimum title examination fee of $100 under the Fairfax schedule while there is a minimum fee for title examination of $75 under the State Bar report, (b) the Fairfax schedule provides for a fee of one-half of one percent of the amount of loan or purchase price, whichever is greater, from $50,000 to $100,000 and one quarter of one percent of the loan amount or purchase price, whichever is greater, from $100,000 to $1,000,000, while the State Bar report provides for a fee of one-half of one percent of the loan amount of purchase price from $50,000 to $250,000 with any amount over $250,000 of loan amount or purchase price to be reached by negotiation or agreement.

wherein the Court held that immunity did not extend to action being taken pursuant to an unconstitutional statute or action taken outside of the authoriy of the governmental agent in question, which exception is generally known as the *ultra vires* exception. There is no allegation that the Virginia State Bar was acting pursuant to an unconstitutional statute, nor that it exceeded its authority.

Additionally, a state may waive its sovereign immunity, *see e.g. Parden* v. *Terminal Railway of Alabama State Docks Department,* 377 U.S. 184 (1964). This Court has made clear, however, in two recent cases that any such waiver intended by Congress must be explicit. It will not be presumed to have acted silently. See *Employees of Department of Public Health and Welfare* v. *Missouri,* 411 U.S. 279 (1973) and *Edelman* v. *Jordan,* 94 S.Ct. 1347 (1974). Congress has not only failed to indicate that a state shall be deemed to have waived its sovereign immunity for purposes of the Sherman Act; but, as previously stated, as far back as 1895, it was ruled that a state was not a "person" within the meaning of the Sherman Act.

Since the State Bar is a state agency and since any judgment would have to be paid from the State Treasury, it is manifest that the State Bar enjoys sovereign immunity in this action.

CONCLUSION

If minimum fee schedules are found to violate the Sherman Act, there would be no necessity for enjoining the State Bar from utilizing them in a determination as to whether unprofessional conduct has occurred. Further, no damages could be assessed against the State Bar. If the Court of Appeals was correct, certiorari should be denied.

In either event the State Bar should properly be dismissed as a defendant and a writ of certiorari as to it should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF RESTON, VIRGINIA HOMEOWNERS,

Petitioners,

v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT FAIRFAX COUNTY BAR ASSOCIATION IN OPPOSITION

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In The

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LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
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V.

VIRGINIA STATE BAR AND
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT FAIRFAX COUNTY BAR ASSOCIATION IN OPPOSITION

The Fairfax County Bar Association hereby respectfully opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

I

QUESTIONS PRESENTED

1. Whether the rescission of the advisory minimum fee schedule by the Fairfax County Bar Association has rendered this case moot.

2. Whether a county bar association advisory minimum fee schedule restrained trade or commerce among the several states.

3. Whether the legal profession is entitled to the learned profession exemption from the antitrust laws.

4. Whether the promulgation of the advisory minimum fee schedule pursuant to a scheme of state regulation is exempt from the antitrust laws.

5. Whether the mere suggestion of minimum fees constitutes unlawful price-fixing.

II.

STATEMENT OF THE CASE

A.

Proceedings Below

Lewis H. and Ruth S. Goldfarb (the Goldfarbs) brought this action in the United States District Court for the Eastern District of Virginia, against the Fairfax County Bar Association (Fairfax) and the Virginia State Bar (State Bar), charging that the promulgation of an advisory minimum fee schedule, as it applied to legal fees for real estate work, constituted a violation of § 1 of the Sherman Act. The suit sought treble damages and injunctive relief pursuant to §§ 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15, 26. Fairfax denied that it had violated

the federal antitrust laws. The damage issue was severed, and the issue of liability was tried by the court without a jury. The district court held that Fairfax's promulgation of an advisory minimum fee schedule constituted price-fixing in *per se* violation of § 1 of the Sherman Act.[1]

On February 2, 1973, a judgment was entered enjoining the use by Fairfax of the advisory minimum fee schedule. Fairfax appealed from that judgment to the United States Court of Appeals for the Fourth Circuit. That court reversed the district court's finding that Fairfax had violated the Sherman Act, holding that the advisory minimum fee schedule was neither in interstate trade or commerce nor did it have a sufficient effect upon interstate trade or commerce to violate the Sherman Act. Further, the court held that restraints upon competition among lawyers, members of a learned profession, are exempt from challenge under the Sherman Act.

B.

The Parties

The Goldfarbs, in the course of their 1971 purchase of a home in Reston, Virginia, made use of the services of a Fairfax County attorney. The Goldfarbs purport to represent a class of plaintiffs consisting of all home buyers in Reston between February 22, 1968, and February 22, 1972.

Fairfax is a voluntary association consisting of attorneys practicing in Fairfax County, Virginia.

The State Bar is an agency of the Commonwealth of Virginia, created by the Virginia Supreme Court pursuant to § 54-49 of the Code of Virginia, whose membership consists of all attorneys licensed to practice law in Virginia.

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[1] The court on the other hand held that the role of the state agencies in the matter was state action exempt from antitrust challenge. Accordingly, it dismissed the action as to the State Bar.

C.

The Purchase

In 1971 the Goldfarbs, who then resided in Arlington, Virginia, signed a contract to purchase a home in Reston, Virginia.[2] The purchase was financed by a deposit with a Virginia contractor of $2,000, a down payment of $37,500, and a $15,000 loan from a lending institution, also in Virginia, secured by a first deed of trust on the property.

The Goldfarbs purchased title insurance, which covered the interest of the mortgagee and their own interest in the property, and retained A. Burke Hertz, an attorney licensed to practice law in Virginia, to handle the legal aspects of the transaction, including the examination and certification of the state of title to the property. The closing on the Goldfarbs' home occurred at Mr. Hertz' Falls Church, Virginia, office.

The Goldfarbs paid Mr. Hertz a fee for examination of title that was equal to the fee recommended by the advisory fee schedule published by Fairfax and other local bar associations, and was equal also to the fee specified in the Minimum Fee Schedule Report promulgated by the State Bar, an official agency of the Commonwealth of Virginia.

D.

State Regulation And The Advisory Fee Schedule

Pursuant to the statutory authority of § 54-48 of the Code of Virginia empowering the Supreme Court of Virginia to prescribe a code of ethics governing the professional conduct of lawyers and to establish disciplinary procedures,

[2] At the time of the purchase, the builder who had constructed the Reston home and the real estate agent through whom the home was purchased both maintained their offices in Reston, Virginia.

that court has adopted and promulgated the Canons of Ethics and Code of Professional Responsibility of the Virginia State Bar. Both the Canons and the Code contemplate and approve advisory fee schedules (Findings of Fact, 355 F.Supp. at 498).

The State Bar, as the legislatively established administrative arm of the Virginia Supreme Court, has been delegated official responsibility for implementing and enforcing the Canons and the Code, including the provisions relating to advisory fee schedules. Accordingly, its advisory opinions rendered pursuant to this authority affirm the propriety of advisory fee schedules (Findings of Fact, 355 F.Supp. at 498-99). In addition, the State Bar's Minimum Fee Schedule Reports in 1962 and 1969 recommended fees for legal services in connection with real estate transactions essentially identical to the suggested fees of the Fairfax advisory schedule (Findings of Fact, 355 F.Supp. at 499). In the course of exercising the responsibility for continuing supervision of fee practices by Virginia lawyers, the State Bar has reviewed the advisory fee schedules of the local bar associations, incorporated them in its own official reports, and disseminated fee information throughout the state.

As the administrative arm of the Supreme Court of Virginia, the State Bar has responsibility for investigating complaints of unprofessional conduct of any of its members. The State Bar has ruled that habitually charging less than the fee prescribed by a local minimum fee schedule can constitute professional misconduct (State Bar Opinions 98, Ex. 30; 170, Ex. 31, Appendix, *infra,* pp. 8-11).

Individual investigations of complaints of unprofessional conduct are carried out by district committees comprised of lawyers appointed by the Council of the State Bar. Investigated findings must be reported to a court of appropriate jurisdiction for further disciplinary proceedings.

The evidence at the trial, however, showed that no attorney has ever been disciplined in Virginia for habitually charging less than the fees prescribed in a minimum fee schedule. The Fairfax Bar Association has never investigated or imposed any sanctions on any member for habitually undercutting its advisory schedule. The evidence also showed that attorneys in Fairfax regarded the fee schedule as a recommendation to be considered among many other factors when establishing an appropriate charge for legal services rendered (Findings of Fact, 355 F.Supp. at 498, 500).

Fairfax, in reliance upon the authority of the State Bar and together with the bar associations of Arlington and Loudoun Counties and the City of Alexandria, adopted its most recent advisory minimum fee schedule on June 12, 1969. The schedule was never circulated to the Association members, but was merely retained at the Fairfax County Courthouse for the use of lawyers who expressly requested it.

On September 16, 1974, Fairfax rescinded its advisory minimum fee schedule, and stated its intention not to reinstitute any fee schedule (App. p. 1).

III.

SUMMARY OF ARGUMENT

For several reasons, the petition for a writ of certiorari should be denied. First, Fairfax's rescission of its minimum fee schedule has mooted the case. A judgment that Fairfax violated the Sherman Act by promulgating a minimum fee schedule should in any event be applied prospectively, limiting the petitioners to injunctive relief only. Because Fairfax has rescinded its minimum fee schedule and does not intend to renew it, the Goldfarbs are no longer in need of relief from this Court. A decision on the merits by this

Court would thus not affect the rights of either petitioners or Fairfax. Under the applicable Supreme Court standards this case is therefore not appropriate for Supreme Court review. There will be time enough to review the issues raised by petitioners here in the context of the existing facts of another case where the issues are alive and rights may still be affected.

Second, the decision of the Court of Appeals that Fairfax did not violate the Sherman Act was entirely correct. At the outset, the jurisdictional requirements are not met because the activities challenged by this lawsuit—fees for title examinations—occurred wholly within the State of Virginia. They thus did not occur in interstate commerce, nor was there any showing of direct and substantial effect upon interstate commerce.

Next, the Court of Appeals followed the established rule that the practice of law does not constitute trade or commerce, but is rather a learned profession. Thus, the Sherman Act, which applies only to restraints upon trade or commerce, does not apply to restraints upon competition among members of the legal profession.

The judgment below is supported by the sound rule of *Parker* v. *Brown*, 317 U.S. 341 (1943), that private actions mandated by state agencies pursuant to a scheme of state regulation cannot be challenged under the antitrust laws. The promulgation of an advisory minimum fee schedule, sanctioned by the panoply of state regulation in Virginia, should not now be held to have subjected a local bar association to antitrust liability.

Finally, there exists an additional ground, not considered by the Court of Appeals, for deciding that no Sherman Act violation occurred in this case. Fairfax intended that its fee schedule be advisory only, to be considered as one of many factors in deciding the reasonableness of a fee under

the applicable ethical rules of the legal profession. Fairfax accordingly did not engage in unlawful price-fixing. Nor was there any showing of injury to the plaintiffs in this case.

The petition should accordingly be dismissed.

IV.

ARGUMENT

A.

The Fairfax County Bar Association's Rescission Of Its Advisory Minimum Fee Schedule Has Rendered This Case Moot.

As recently stated by this Court in *DeFunis* v. *Odegaard*, ... U.S. ....., 40 L.Ed. 2d 164 (1974), " 'federal courts are without power to decide questions that cannot affect the rights of the litigants before them.' " 40 L.Ed. 2d at 168. [Quoting *North Carolina* v. *Rice*, 404 U.S. 244 (1971)]. This requirement is not met in the case at bar.

Even assuming that after years of unchallenged use, advisory minimum fee schedules are to be held to have violated the Sherman Act, any relief against that violation in this case should be granted prospectively only. In that event, petitioners would be entitled only to injunctive and declaratory relief. Since the advisory minimum fee schedule has been rescinded, nothing remains to be enjoined or declared illegal. Furthermore, there is no likelihood of recurrent violation. Therefore, a decision by this Court as to the legality of the former advisory minimum fee schedule would not affect the rights of the litigants before this Court.

1.

Prospectivity

In *Chevron Oil Co.* v *Huson*, 404 U.S. 97 (1971), the Supreme Court listed three separate considerations for determining whether a civil decision should be applied non-retroactively. First, "the decision . . . must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . , or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." Second, a court should look "to the prior history of the [proposed] rule in question, its purpose and effect, and whether retrospective operation will further retard its operation." Third, a court should weigh "the inequity imposed by retroactive application . . . ." 404 U.S. at 106-107. All of the *Chevron* criteria are met in this case.

First, application of the antitrust laws to the legal profession would overrule past precedent. Supreme Court decisions in *FTC* v. *Raladam*, 283 U.S. 643 (1931), and *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427 (1932), established that the term "trade," as used in the Sherman Act, does not include the "learned professions." In the forty-one years since *Atlantic Cleaners* the Supreme Court has never changed this position. Lawyers thus have assumed that they practice a learned profession.

More specifically, since the inception of the Sherman Act, members of the legal profession have justifiably assumed that minimum fee schedules were safe from antitrust attack. At least thirty-four states and hundreds of local bar associations have promulgated such schedules. Advisory fee schedules have been contemplated by the Canons of Ethics and the Code of Professional Responsibility. Numerous state court decisions have approved the use of minimum fee schedules as persuasive evidence of a reasonable fee.[3] In-

[3] *See, e.g., Matter of Freeman*, 40 App. Div. 2d 397 (N.Y. 1973); *Buckles* v. *Continental Cas. Co.*, 197 Ore. 128, 252 P.2d 184 (1952); *Re Felton's Estate*, 199 Misc. 507, 99 N.Y.S. 2d 351 (1950); *Succession of Neil*, 205 La. 214, 17 So.2d 255 (1944); *Broughton* v. *Nance*, 244 Ala. 499, 14 So. 2d 505 (1943).

deed, in these cases the judges themselves referred to such schedules to help them determine the amount of attorneys' fees to award.

Until very recently, the Justice Department had never brought a suit challenging an advisory minimum fee schedule in the legal profession. To the contrary, in response to an inquiry from the Arlington County Bar Association, an Assistant Attorney General of the Antitrust Division of the Justice Department advised the Arlington Bar in 1961: "The Antitrust Division has never taken the position in the past that advisory minimum fee schedules established by Bar Associations were subject to prosecution under the federal antitrust laws." He went on to say that the Department's position was based upon the fact that local bar activities were not "in commerce" and the fact that the fee schedules were advisory only (Ex. 36, App. 12).

In 1965 Donald F. Turner, Acting Assistant Attorney General of the Antitrust Division, reiterated the Department's position that mere advisory fee schedules were not subject to antitrust challenge (Ex. 40, App. 14). Indeed, the absence of any litigation whatsoever until the present suit is indicative of the prevalent view that advisory fee schedules did not violate the antitrust laws. Thus this Court is plainly being asked to decide "an issue of first impression whose resolution was not clearly foreshadowed . . . ." 404 U.S. at 106.

Nor would imposition of treble damages upon Fairfax advance the purpose of a rule declaring advisory fee schedules in violation of the Sherman Act. The obvious purpose of such a rule would be to deter the promulgation and use of such schedules. This purpose may be accomplished, however, without the harsh imposition of damages for a retroactive violation of the rule. The Justice Department's abrupt

reversal of its view of lawyers' fee schedules has been widely publicized. Indeed, the Department has only very recently challenged a fee schedule promulgated by the Oregon State Bar. Such enforcement activity must have a chilling effect upon the promulgation of fee schedules.

Finally, in view of *Atlantic Cleaners* and the prevalent belief that minimum fee schedules did not violate the antitrust laws, retroactive application of a decision that minimum fee schedules are unlawful would impose substantial inequity upon thousands of lawyers across the country. Retroactive application would mean that hundreds of local bar associations would be subject to incredibly burdensome treble damages liability for activities thought to be perfectly legal, indeed approved by authoritative professional bodies.

2.

MOOTNESS

Any prospective decision by this Court as to the illegality of the advisory minimum fee schedule promulgated by Fairfax would preempt an award of damages to plaintiffs, in favor of an injunction against the future promulgation of such advisory fee schedules. Such relief is unnecessary in this case, for Fairfax has already rescinded its advisory minimum fee schedule and has stated its intention not to institute such schedules in the future (App. 1).

In *DeFunis* v. *Odegaard,* ..... U.S. ....., 40 L.Ed. 2d 164 (1974), this Court recently reiterated the criterion for determining when a case is moot. Because a decision in that case was no longer necessary to provide the appropriate relief, this Court held that the case was moot. "The controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests.'" 40 L.Ed. 2d at 169.

In so holding, this Court expressed its willingness to rely upon a representation of intention by one of the parties. "[I]t has been the settled practice of the court, in contexts no less significant, fully to accept representations such as these as parameters for decisions." 40 L.Ed. 2d at 169.

To be sure, the *DeFunis* case does distinguish a line of decisions establishing the general rule that a case does not become moot merely because the defendant has voluntarily ceased the allegedly illegal conduct. *See, e.g., United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Even so, this Court said in *Grant,* the case would still be moot if it could have been said with assurance "that there [was] no reasonable expectation that the wrong would be repeated." *Id.* at 633.

Thus, this distinction does not serve to render *DeFunis* inapplicable to the case at bar, for there is no reasonable expectation that Fairfax will repromulgate an advisory minimum fee schedule. Now that the Justice Department has stated its belief that minimum fee schedules are unlawful under the antitrust laws, and indeed has filed a lawsuit against a minimum fee schedule in Oregon, lawyers are on notice that they may be violating the law in promulgating such schedules. The unmistakable trend in this country is thus toward rescission of minimum fee schedules. The Fairfax County Bar Association, composed entirely of lawyers, has stated that it will not repromulgate a minimum fee schedule. This representation, as in *DeFunis,* should be sufficient to establish that there is no likelihood in this case of a recurrent violation.[4]

[4] This Court has on a number of occasions decided that a case was mooted by voluntary cessation of the challenged activity. *See, e.g., Commercial Cable Co.* v. *Burleson,* 250 U.S. 360 (1919); *A. L. Mechling Barge Lines, Inc.* v. *United States,* 368 U.S. 324 (1961); *Oil Workers Local 8-6* v. *Missouri,* 361 U.S. 363 (1960).

Although in *W. T. Grant Co.* this Court refused to hold that the lawsuit was actually moot, even then it considered whether injunctive relief was appropriate against discontinued acts. This Court noted that, although injunctions are directed at future violations, the moving party must still satisfy the court that relief is needed.

> "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than a mere possibility which serves to keep the case alive. . . . To be considered are the bona fides of the express intent to comply, the effectiveness of the discontinuance, and in some cases, the character of the past violations." *Id.* at 633.

In *Grant,* the government relied on the fact that the defendant had failed to terminate his violation until after the suit was filed and expressly refused to concede that the activity in question was illegal. This Court nevertheless refused to grant injunctive relief, noting that the government had only recently attempted systematic enforcement of the law involved and that the defendants had sworn under oath that they would not resume the challenged activity.

These considerations would seem relevant to this Court's decision whether to grant the petition. Unquestionably, Fairfax is sincere in its stated intention not to promulgate another minimum fee schedule. Moreover, the character of its alleged past violation clearly reveals that Fairfax is not the kind of defendant to engage in repeated violations of the law. It had been assumed by lawyers for years that advisory minimum fee schedules were perfectly legitimate. Only recently has anyone, governmental or private, challenged their legality. Injunctive relief is therefore inappropriate and unnecessary.

B.

The Court Of Appeals Correctly Held That the Alleged Antitrust Violation Did Not Restrain Trade "Among the Several States."

Section 1 of the Sherman Act prohibits only restraints of trade "among the several states." To meet this requirement, the acts complained of must either (1) occur within the flow of interstate commerce, *Las Vegas Merchant Plumbers' Association* v. *United States,* 210 F.2d 732, 739 n. 3 (9th Cir.), *cert. denied,* 348 U.S. 817 (1954), or (2) significantly affect interstate commerce, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 234 (1948). Thus, the Sherman Act fails to reach commercial activity if it is not in the flow of interstate commerce and is either essentially local or has only an insignificant effect on interstate commerce. The Court of Appeals correctly held that the challenged activity in the case at bar fails to meet either of these tests.

The plaintiffs were residing in Virginia when they contracted to purchase a home in Reston, Virginia (Findings of Fact, 355 F.Supp. at 500). The owner of the home and his real estate agency were located in Virginia (Findings of Fact, 355 F.Supp. at 500). All transactions relating to the purchase of plaintiffs' home, including the negotiation for sale, contract of sale, title examination, securing of the mortgage loan, settlement, and all legal services, occurred within the State of Virginia (Findings of Fact, 355 F.Supp. at 500).

The Court of Appeals correctly held that the fact that many residents of Fairfax County work outside of Virginia is totally irrelevant. Such interstate movement of persons is merely incidental to the purchase of homes in Virginia. As the Court of Appeals aptly stated:

> "The interstate commerce which is allegedly affected by the fee schedule is the financing of home mortgages; the fact that the mortgagor commutes across state lines to his job is of no interest to the mortgagee or to this court." 497 F.2d at 16-17.

The court noted that the practice of real estate law is an activity of essentially local character. Further, the court found no case holding that a local service may be subject to the Sherman Act merely because the consumer or recipient of the service utilized it incidentally in the course of transacting interstate business.

Burke v. *Ford,* 389 U.S. 320 (1967), cited by petitioners, is clearly distinguishable from the case at bar. In *Burke* this Court held that a division of territories among Oklahoma liquor dealers, whose liquor was sent from out-of-state, was shown to have had a substantial effect on interstate commerce. Obviously, the very subject of the restraint, liquor, was involved in interstate commerce. In the case at bar, however, the lawyers' service of title examination is the essence of the challenged activity, and it is clearly intrastate. Mortgage money, some of which may come from out-of-state, has nothing to do with the title examination, and therefore does not serve to bring it within the interstate commerce requirement of the Sherman Act.

Contrary to petitioners' assertion, there is no conflict among the circuits on this point. *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia,* 490 F.2d 48 (3d Cir. 1973), cited by petitioners as a conflicting decision, may be distinguished on its facts. In refusing to dismiss that case for lack of subject matter jurisdiction, the court held that the alleged effects on interstate commerce were direct and substantial. In the instant case, however, the simple fact is that petitioners established, at most, nothing more than an incidental and insignificant effect upon interstate commerce. There was no proof whatever that the minimum fee schedule sig-

nificantly restrained the flow of mortgage money into Virginia.

Thus, the legal "tests" are settled, but each case in this area turns upon its unique facts. The seeming inconsistency, if any there be, results not from a conflict as to the applicable law, but rather from the inevitable differences in facts and quality of proof in individual cases.

Petitioners argue that allowing the decision of the Court of Appeals to stand would prevent Congress from regulating minimum fee schedules under the Commerce Clause. Obviously the Court of Appeals did not intend, nor will its decision require, such a result. Its holding with regard to interstate commerce rests on the narrow ground that the challenged activity *in this case* is essentially local and has no substantial effect upon interstate commerce. It remains to be determined whether in other cases other minimum fee schedules may restrain trade or commerce among several states. As pointed out in *Doctors, Inc.*, "precedent in this area is unlikely to dictate the outcome in any given case." 490 F.2d at 51.

C.

The Court Of Appeals Correctly Held That Insofar as the Advisory Minimum Fee Schedule Restrained Competition among Attorneys, Members of a "Learned Profession," It Is Not Subject to the Provisions of the Sherman Act.

Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of *trade or commerce*. The Supreme Court has consistently recognized that services rendered by a "learned profession" do not constitute "trade or commerce." *See FTC* v. *Raladam*, 283 U.S. 643 (1931) (medical profession); *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922) (legal profession); *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427 (1932) (learned profession generally).

The unique characteristics and needs of the legal profession provide sound policy grounds for the learned profession exemption. As in the regulated industries, society has chosen to withdraw the discipline of competition and substitute instead a regulatory mechanism in the form, in Virginia, of the State Bar. Each component of the practice of law is supervised and regulated by the State Bar. Entry into the profession is controlled through the bar examination and licensing procedure. Poor legal service is prevented by enforcement of the Canons of Ethics. And proper fee practices are mandated by the Canons of Ethics as supplemented by the advisory minimum fee schedules. Indeed, states have forbidden the very essence of competition—the solicitation of clients. Regulation thus substitutes for competition as the governor of the legal profession.

Petitioners contend that they do not seek to utilize the Sherman Act to regulate the manner in which legal services are rendered. Nevertheless, a decision that the Sherman Act applies with full force to the legal profession would result in an unprecedented revolution in the legal profession with harmful effects to the public. The destructiveness of competition in the legal profession results from the difficulty that clients would encounter in making quality comparisons among lawyers' services. Since that would make price comparisons determinative to most consumers, there would exist a positive disincentive for the investment of time in legal activity. The inevitable effect would be to reduce the quality of legal services. The greater the difficulty of the consumer in judging quality,

> ". . . the greater the temptation of competitors to cut corners, since the competitor that skimps does not at

once lose all his customers, while the one that scrupulously maintains quality may be inadequately rewarded for the higher costs of doing so." 2 Kahn, *The Economics of Regulation* (New York, 1971) at 176.

The price of such competition would be particularly high in the area of real estate law, where any deficiency in a title examiner's work would not be known for years. In most cases only when a family sought to sell their home, after years of residence and paying mortgage lenders, would it become evident that faulty legal work had deprived them of the benefits of quiet title.

A ruling by this Court that minimum fee schedules violate § 1 of the Sherman Act would inevitably entail other harmful effects. Such a ruling would necessarily contravene the profession's prohibitions of solicitation and advertising. As the Court of Appeals noted, lawyers would face the dilemma of choosing between liability under the Sherman Act for adherence to the profession's rules, on the one hand, and discipline from their local bar associations for engaging in unrestrained and unethical competition on the other.

Other unforeseen and certainly unintended consequences could flow from such a holding. Lawyers considering the establishment of a partnership would be required to analyze their plans under the standards of § 7 of the Clayton Act prohibiting anticompetitive mergers. Special fee arrangements for retainer clients might be regarded as unlawful price discrimination, or, at the very least, exclusive dealing violative of §3 of the Clayton Act. A single law firm in a small town, rather than serving all who need legal services, would be required to consider turning down business to avoid violation of the monopolization provisions of § 2 of the Sherman Act.

The Court of Appeals was careful to limit the learned profession exemption to restraints upon competition among members of the learned profession. It was on this basis that the court distinguished *American Medical Association* v. *United States,* 317 U.S. 519 (1943), in which this Court held that a group of doctors violated the Sherman Act when they conspired to obstruct the interstate sale of health insurance. This Court expressly refused to determine whether the practice of medicine constitutes "trade" under § 3 of the Sherman Act. *Id.* at 528. Nevertheless, if the doctors had conspired to restrain the practice of another doctor, there would have been no Sherman Act violation, since the practice restrained, a learned profession, is neither trade nor commerce.

If the antitrust laws are to be applied to the learned professions with all the attendant potential for undesirable results, that ought to be done by the legislature taking the special characteristics of the professions into account. As the Fourth Circuit said, this is an area where judicial legislation is particularly inappropriate.

> "In our governmental system a legslative body is better equipped to accommodate these restrictions imposed upon the practice of a profession to the overall design and purpose of the antitrust laws." 497 F.2d at 19.

D.

The Fairfax Advisory Minimum Fee Schedule Is Exempt from Antitrust Challenge as Lawfully State-Regulated Action.

This Court has long applied the principle that the antitrust laws should not apply to disrupt state regulation. In *Parker* v. *Brown,* 317 U.S. 341 (1943), private action approved by state regulatory authority was challenged under the federal antitrust laws. This Court, finding that Congress

did not intend that the Sherman Act should hinder a state's ability to regulate in the interest of its citizens, held the state-approved private action exempt from antitrust challenge.

The Court of Appeals said that *Parker* set forth three factors to be considered when determining whether a challenged activity is entitled to the state action exemption. First, the challenged action must be in the public interest. Second, the industry must be actively and continually supervised by independent state officials. Third, the challenged activity must receive its authority and efficacy from a legislative command of the state. Although the Court of Appeals found that the primary aim of the minimum fee schedule promulgated by Fairfax was to benefit the public, it held that the two other "requirements" of *Parker* were not satisfied.

In refusing to afford *Parker* immunity to Fairfax in this case, the Court of Appeals erred in two respects. First, it misinterpreted *Parker* as requiring active, independent state supervision of challenged activity. Second, it erred in finding that Fairfax's minimum fee schedule did not receive their authority and efficacy from a legislative command of the state.

Scrutiny of the *Parker* opinion reveals that it simply does not hold that activities must be under active state supervision to become entitled to the state action exemption. Rather, *Parker* requires only that state involvement in the challenged activity must be sufficient to characterize the activity as state-approved and contemplated rather than purely individual. Thus, private action deriving "its authority and efficacy from a legislative command of the state" cannot be challenged under the antitrust laws. 317 U.S. at 350.

In *Parker* the Supreme Court held that a program to

regulate the marketing of raisins, proposed by private producers but adopted and enforced by a state agency, was a product of state action and therefore was not subject to antitrust attack.

> "[I]t is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command." *Id.* at 350.

Thus the basis for the Court's view was that the Sherman Act, though clearly intended to prevent restraints of competition by individuals and corporations, was not meant to restrain "state action or *official action directed by a state.*" *Id.* at 351 (emphasis added). Nowhere in the *Parker* opinion did the Court say that active, independent state supervision is required.

Contrary to the view of the Court of Appeals, Fairfax's minimum fee schedules did derive their authority and efficacy from a legislative command of the State of Virginia. The Virginia State Bar is created and authorized by statute to supervise and regulate the activities of lawyers in Virginia. Virginia Code §§ 54-48 *et seq.* As the administrative agency of the Supreme Court of Virginia, the State Bar administers rules and regulations promulgated by the Supreme Court to govern the conduct of attorneys. The State Bar's authority to investigate complaints of unprofessional conduct is the enforcement backbone of the regulatory scheme provided by the State of Virginia for licensed lawyers.[5]

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[5] Virginia Supreme Court Rule 13 sets out procedures for enforcement of Supreme Court rules and regulations. *See* Rules of the Supreme Court of Virginia, Part 6, Section IV, Rule 13 (as published in 205 Va. 1011, 1040-42 (1964) and amended in 210 Va. 411 (1969)).

The Virginia statutes give the Supreme Court of Virginia general authority to prescribe a code of ethics governing the professional conduct of lawyers. *See* Virginia Code § 54-48(b). Pursuant to that authority, the Court has promulgated the Canons of Ethics and the Code of Professional Responsibility, which contemplate and approve minimum fee schedules (Findings of Fact, 355 F.Supp. at 498). Canon 12 of the Canons of Ethics and EC 2-18 and DR 2-106(B)(3) of the Code of Professional Responsibility expressly approve the use of minimum fee schedules promulgated by local bar associations (Findings of Fact, 355 F.Supp. at 499). In addition, the Virginia State Bar has in two advisory opinions signified its intention to regulate personal solicitation by lawyers, an ethics offense, at least partially by the use of suggested minimum fee schedules. Thus, habitual charging of less than the fee prescribed in a local minimum fee schedule can constitute the ethics offense of personal solicitation. *See* Opinion No. 98, June 1, 1960 (Ex. 30, App. 8); Opinion 170, May 28, 1971 (Ex. 31, App. 10).

Moreover, the State Bar has twice published Minimum Fee Schedule Reports setting forth and analyzing the existing fee schedules promulgated by various local bar associations in Virginia. The 1969 Report recommended that the fees contained therein should be assessed in 1969 for the specified legal services (Ex. 27, App. 2). Thus the State Bar, rather than issuing a state-wide fee schedule, relies upon local bar associations, in accordance with EC 2-18 and DR 2-106, to promulgate local fee schedules, using the state Minimum Fee Schedule Reports as a guide. *See* Virginia State Bar, Minimum Fee Schedule Report 3 (1969) (App. 2). The obvious purpose of this delegation of responsibility is to give local associations flexibility to

adjust the state recommended fees according to local circumstances. *Id.* Thus, Fairfax's role in promulgating its advisory fee schedule was that of a virtual functionary of the State Bar, attuned to local circumstances that should properly be considered in promulgating the recommended schedule.

Provisions of the Canons of Ethics and Code of Professional Responsibility on the point of minimum fee schedules, together with the State Bar Opinions and the language of the Minimum Fee Schedule Reports issued by the State Bar, demonstrate that local bar associations, including Fairfax, have issued suggested fee schedules in response to guidance from state regulatory authority. As in *Parker*, Fairfax's minimum fee schedule was never intended to operate by force of individual agreement or combination. To the contrary, it derived its authority and efficacy from a state proscription of personal solicitation and the state's approval of minimum fee schedules as a means of enforcing this proscription. Under these circumstances, to hold that local promulgation of an advisory fee schedule violates the antitrust laws would subject these lawyers to contradictory legal standards. For precisely this reason, the *Parker* v. *Brown* doctrine establishes the priority that state regulation shall prevail.

E.

Fairfax's Promulgation of a Suggested Fee Schedule Did Not Constitute Price-Fixing.

The Court of Appeals did not find it necessary to consider whether Fairfax had actually engaged in price-fixing. An examination of the facts in this case and the applicable law, however, reveals that Fairfax, in promulgating an advisory fee schedule, did not engage in price-fixing.

This Court has held that the exchange of price information among competitors does not constitute price-fixing unless it is established that such exchange is utilized to fix prices. *See Maple Flooring Manufacturers Association* v. *United States,* 268 U.S. 563 (1925). In addition, in the case at bar, there was no agreement to adhere to a price schedule. Moreover, the information in the schedule was general in nature, without the individual detail that this Court found fatal in *United States* v. *Container Corp. of America,* 393 U.S. 333 (1969).

The evidence adduced at trial clearly demonstrates that Fairfax intended its fee schedule to be advisory, to be used as one factor among many in determining a reasonable fee (Ex. 29, App. 5). Indeed, Fairfax never attempted to invoke the enforcement machinery of the State Bar against a member for failure to adhere to the fee schedule (Findings of Fact, 355 F.Supp. at 498). No disciplinary procedures nor threat of them have ever been undertaken in connection with a failure to observe the suggested fee schedules. *Id.* Moreover, all Virginia lawyers are constrained by the Code of Professional Responsibility to look at the fee customarily charged in their locality for similar services only as *one* of eight factors to be considered as guides in determining the reasonableness of a fee. *See* DR 2-106, Rules of the Supreme Court of Virginia, Part 6, Section II (January 1, 1971) (Findings of Fact, 355 F.Supp. at 500); Opinion No. 170, Virginia State Bar Committee on Legal Ethics (Ex. 31, App. 10). Thus the uncontradicted evidence is that the schedule was merely advisory.

Not only was there no intention on the part of Fairfax to fix fees, but promulgation of the advisory schedule did not have that effect. The evidence shows that members of the Association did not consistently adhere to the schedule

(Findings of Fact, 355 F.Supp. at 500). Even when a schedule fee was charged, it was only after an evaluation of its fairness, the time and labor required, the degree of expertise utilized, recent similar transactions and the other factors enumerated in Canon 12.

Finally, Fairfax has never attempted to circulate its advisory fee schedule to its members. It merely made the schedule available at the courthouse for those lawyers who wished to have it and made no effort to distribute it among the membership.

It is clear, therefore, that Fairfax's fee schedule was not intended and was not used to fix fees. There was no showing at the trial court level that price-fixing was contemplated, that the fee schedule entailed control of fees, or that there was any effect on fee levels whatsoever. Any discipline to be imposed in connection with charging less than the suggested fees would not be imposed for failure to adhere to the minimum fee schedule as such, but would be directed against the unethical practice of solicitation under the rules of the Virginia Supreme Court. *See* Opinion No. 98 of the Virginia State Committee on Legal Ethics, (June 1, 1960) (Ex. 30, App. 8). Since aiding compliance with the Code of Professional Responsibility is surely a legitimate regulatory purpose, the suggested fee schedule should not be treated as price-fixing.[6]

V.

CONCLUSION

The decision of the United States Court of Appeals is clearly correct and based upon sound principles of law and policy. It presents no conflict with the decisions of this

[6] *Cf. Matter of Freeman,* 40 App. Div. 2d 397, 400 (N.Y. 1973).

Court or the decisions of other circuits. The petition for a writ of certiorari should be denied.

Respectfully submitted,

LEWIS T. BOOKER
JOHN H. SHENEFIELD
T. S. ELLIS, III
GARY V. MCGOWAN
HUNTON, WILLIAMS, GAY & GIBSON
Post Office Box 1535
Richmond, Virginia 23212
Attorneys for Respondent Fairfax County Bar Association

APPENDIX

APPENDIX

RESOLUTION OF FAIRFAX BAR ASSOCIATION

SEPTEMBER 16, 1974

WHEREAS, the Fairfax Bar Association defended the action and thereafter appealed the decision of the United States Court for the Eastern District of Virginia to the United States Court of Appeals for the Fourth Circuit in a certain lawsuit styled *Lewis H. Goldfarb, et al.* v. *Virginia State Bar, et al.* out of the Association's concern about the unprecedented application of the Antitrust Laws to the practice of law; and

WHEREAS, there is not now and never has been uniform adherence to any minimum fee schedule by members of the Fairfax Bar Association and no such schedule has been promulgated since February 2, 1973 when the aforesaid decision was rendered in the United States District Court for the Eastern District of Virginia;

NOW, THEREFORE, BE IT RESOLVED that the minimum fee schedule adopted by the Fairfax Bar Association on June 12, 1969, is hereby rescinded; that it is the intention of the Fairfax Bar Association not to reinstitute any such schedule; and all members of the Fairfax Bar Association will be notified accordingly.

EXHIBIT 27

VIRGINIA STATE BAR

MINIMUM FEE SCHEDULE
REPORT

1969

Printed with the Compliments of
THE MICHIE COMPANY

MINIMUM FEE SCHEDULE REPORT (1969)

STATEMENT BY COMMITTEE ON PROFESSIONAL EFFICIENCY AND ECONOMIC RESEARCH

The Minimum Fee Schedule Report (1969) submitted herewith by the Committee on Professional Efficiency and Economic Research updates the previous report submitted by a similar committee and approved by Council in 1962. The report *does not* constitute a state-wide minimum fee schedule but, as in 1962, is a report on the analysis of existing suggested fee schedules in Virginia. The committee bases its report on an analysis of some twenty-two minimum fee schedules which have been adopted by local bar associations in Virginia. Copies of the spread sheets used for this analysis are attached for reference.

The recommended minimum fee figures in the committee's report represent the consensus recommendations of members of the committees as to the minimum fees which should be assessed in 1969 for the various legal services indicated.

It will be noted that the revised report reflects a general scaling up of fees for legal services. The committee feels that this is to be expected because of the escalating cost of operating a law office and the spiraling increase in the cost of living in recent years. In a few instances there are substantial differences in the 1969 recommended minimum fees compared with the 1962 recommended minimum fees. These wide differences are due largely to what the committee believes to have been inexact appraisals in the past of reasonable minimum fees for certain legal services. Experience during the past seven years has been sufficient to enable the committee to recommend adjustments to correct obvious errors in judgment, which incidentally were notably few in number. The present committee is certainly subject to errors

in judgment also, and future committees will undoubtedly find it necessary to make correcting recommendations based on accumulated experience.

The committee recommends that Council approve the Committee's report on minimum fee schedules and that the report be promulgated to the entire Bar of Virginia for its consideration. It should be clearly understood that no local bar association is bound by the committee's recommendations; that certain adjustments will have to be made in various circuits within the State. The schedule is submitted simply as recommendations and for the guidance of local bar associations.

* * *

EXHIBIT 29

MINIMUM FEE SCHEDULE

THE ALEXANDRIA BAR ASSOCIATION
THE ARLINGTON BAR ASSOCIATION
THE FAIRFAX BAR ASSOCIATION
THE LOUDOUN BAR ASSOCIATION

The following schedule was adopted by each of the above Bar Associations. The schedule is the same for each Bar Association except where noted to the contrary.

Effective date:

The Alexandria Bar Association—July 1, 1969
The Arlington Bar Association—July 8, 1969
The Fairfax Bar Association—June 12, 1969
The Loudoun Bar Association—July 21, 1969

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with the
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* * *

STATEMENT OF PURPOSES

The applicable canons of professional ethics established the standards for determining a reasonable fee which a lawyer should charge in a given case. The purpose of a minimum fee schedule is not to fix a reasonable fee under all circumstances but is, as the name implies, a suggested minimum fee for the average case. A minimum fee schedule is based on the assumption of an ordinary transaction with a minimum of complicating circumstances as well as a minimum of time and responsibility on the part of the lawyer. It does not profess to set a fee in given cases but is suggested as a guideline.

This schedule of proposed minimum fees is advisory only and is intended to be applied as a guide in determining the conduct of the local bar as to what should be charged as a minimum under the circumstances outlined above. In all cases, the individual lawyer has the responsibility of determining a proper fee under all circumstances. There is no intention to require that the individual lawyer should use this schedule as a means of evading his ultimate responsibility to fix a fair and reasonable fee considering all of the circumstances of a particular case.

As a caveat it should be observed that the Virginia State Bar Committee on Legal Ethics, in Opinion 98 rendered June 1, 1960, ruled that a lawyer who intentionally and regularly charges less than the customary charges of the Bar for similar services as reflected in a schedule of suggested minimum fees for the purpose of increasing his business, with resulting personal gain, violates the Canons of Ethics in that his actions constitute a form of solicitation. Thus consistent and intentional violation of the suggested minimum fee schedule for the purpose of increasing

business can, under given circumstances, constitute solicitation.

With these above considerations in mind, it should be realized that the schedule does not prohibit a lawyer from rendering legal services without charge or for less than the minimum charges specified herein to charitable or religious associations, to persons who would otherwise lack protection of their legal rights, or for any other proper ethical consideration which justifies the fee in a particular case. Solicitation thus is determined by the particular circumstances involved, but can exist from a repeated course of action by attorneys who fit within the purview of Opinion 98 specified herein. It is strongly recommended that all lawyers read Opinion 98.

As a parallel consideration, it is just as improper for a lawyer to imply to clients or prospective clients that another lawyer who charges more than the minimum fees specified in this schedule is acting improperly. To do so would be to intimate what is not true. This is not a schedule of usual, regular or maximum fees and to state otherwise or publicly criticize lawyers who charge more than the suggested fees herein might in itself be evidence of solicitation on the part of any lawyer making such a suggestion.

The adoption of this schedule by the Bar Association is a public pronouncement of its determination to enhance the prestige of the Bar. With that end in view the recommended fees listed in this schedule are to be taken as a conscientious effort to show lawyers in their true perspective of dignity, training and integrity. Each lawyer must establish his own fees and the suggested minimum fee schedule set forth herein is to be used by lawyers as a guideline in appropriate cases. This document is not intended and should never be used to replace the individual discretion of attorneys to set their fees depending upon the particular circumstances of each particular case.

EXHIBIT 30

OPINION No. 98

JUNE 1, 1960

Subject:

Effect of "minimum fee schedule" adopted by a bar association.

Inquiries:

A lawyer, engaged in practice in a city where the local bar association has adopted a schedule of minimum fees to be charged for certain legal services, has referred to this Committee the following questions:

1. May a lawyer set his fees at sums less than charges suggested by a "schedule of minimum fees" adopted by his local bar association?

2. May the lawyer repeatedly charge such smaller fees?

It is important to observe that the inquiring lawyer states that his local association has adopted the schedule as a suggestion to its members, and has not undertaken to make its observance obligatory.

Opinion:

These inquiries are controlled by Canon 12 of the Canons of Professional Ethics. After reciting that in determining a fee, a lawyer may consider several influencing factors, one of which concerns charges customarily made by others for similar services, the Canon continues:

> "* * * No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

> "In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee."

It follows that normally a lawyer may properly set his fee at a sum less than that suggested by a locally approved minimum fee schedule where, as hereafter stated, such charge appears justified.

We fully approve the recital in Canon 12 concerning minimum fee schedules that "no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee." We also are of the opinion that each lawyer has both a right and an ethical duty to charge a fee lower than that recited in a minimum fee schedule where the time required for the particular service, and its value, are themselves minimal, or where the poverty of a client, or other proper ethical consideration justifies such lower charge.

However, this is to be distinguished from the situation existing where a lawyer, purely for his own advancement, intentionally and regularly bills less than the customary charges of the bar for similar services as reflected in a schedule of suggested minimum fees. Where the motive prompting the lawyer to repeatedly charge less is to increase his practice with resulting personal gain, it becomes a form of solicitation contrary to Canon 27 and also a violation of Canon 7, which forbids the efforts of one lawyer to encroach upon the employment of another. To ignore such schedules under these circumstances has no ethical justification and deserves censure.

EXHIBIT 31

VIRGINIA STATE BAR
COMMITTEE ON LEGAL ETHICS
OPINION NO. 170

May 28, 1971

Subject: Minimum Fee Schedule adopted by local bar Associations.

Inquiry: Does the Legal Ethics Committee adopt formally ABA Opinion 323 and does the Committee affirm the statements set forth in Legal Ethics Opinion 98 of this Committee?

ABA Formal Opinion 323 holds that minimum fee schedules can only be suggested or recommended and cannot be made obligatory, but that such minimum fee schedule is *one* element along with the other elements stated in Canon 12 and DR 2-106(B), which a lawyer should consider in determining a proper fee. The ABA opinion also holds that if a lawyer wantonly ignores the customary charges for similar services in his community in fixing his own fees, then he is failing to take into account one element which both Canon 12 and DR-106(B) say should be considered and if it is established through extrinsic evidence that he is doing this for unethical purposes, then all of this evidence taken together *may* establish unethical conduct. The ABA opinion concludes by stating that the Committee "has no hesitancy in holding that mere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action. There are too many other elements to be considered (five under Canon 12, seven under DR 2-106) which might justify departure from the fee schedule."

Your Committee agrees that minimum fee schedules cannot be made obligatory and that such schedules are but one element to be considered along with those set forth in Canon 12 and DR 2-106(B) in determining a proper fee.

Your Committee disagrees with that part of the ABA formal opinion 323 that holds that mere failure to follow a minimum fee schedule, even where habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action. It is the opinion of this Committee that evidence that an attorney *habitually* charges less than the suggested minimum fee schedule adopted by his local bar Association, raises a presumption that such lawyer is guilty of misconduct and requires the lawyer to produce evidence that such charges are not made for the purpose of soliciting business but because the elements set forth in Canon 12 and DR 2-106 justify departure from the suggested minimum fee schedule.

This Committee reaffirms the statements contained in Virginia State Bar Legal Ethics Opinion 98.

The member of the Bar requesting this opinion is entitled to note an appeal to the Council within ten days from the date of mailing. This opinion will be presented to the Council at its next meeting on June 10, 1971.

/s/ N. S. Clifton

N. Samuel Clifton
Executive Director

May 28, 1971

EXHIBIT 36

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C.

(Seal Omitted)

Address Reply to the Division Indicated
Refer to Initials and Number
LL:RLW:LB
60-360-0

November 24, , 1961

Robert A. McGinnis, Esquire
McGinnis, Berg, Shadyac and Nolan
2014 16th Street, N.
Arlington, Virginia

Dear Mr. McGinnis:

This is in reference to your letter of October 12, 1961, in which, as Chairman of a committee to study the advisability of the Arlington County Bar Association's adoption of a proposed or suggested minimum fee schedule, you requested the advice of the Antitrust Division as to whether or not the adoption of such a fee schedule would violate the federal antitrust laws.

The Antitrust Division has never taken the position in the past that advisory minimum fee schedules established by Bar Association were subject to prosecution under the federal antitrust laws. It should be noted, however, that the posture of the Division in these matters was based primarily upon the presence of the following factors:

1. The activities of the local Bar Associations were not "in commerce" and did not appear to have a significant "affect" [sic] upon interstate commerce; and

2. The fee schedules established were not agreed upon as the amounts to be charged, but were advisory only and not mandatory or binding upon either the members of the profession or the Association concerned.

With respect to the latter, it would appear that certain canons of the established canons of ethics require that the individual lawyer retain responsibility for the establishment of his own fees and retain the freedom to make appropriate charges where the usual fees are not appropriate.

I hope that this may be of assistance to you.

Sincerely yours,

Lee Loevinger
Assistant Attorney General
Antitrust Division

by /s/ Robert L. Wright
Robert L. Wright
First Assistant

EXHIBIT 40

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C. 20530

(Seal Omitted)

Address Reply to the Division Indicated
Refer to Initials and Number
DFT:LB
60-360-0

July 8, 1965

Mr. Hugh C. Cregger, Jr.
President, Arlington County
Bar Association
Court House
Arlington, Virginia

Dear Mr. Cregger:

This acknowledges receipt of your letter of June 14, 1965 in which you indicate the position of the Arlington County Bar Association towards minimum fee schedules.

We note that in conformance with our recent discussion you have informed each member of the Association that any published schedule is not binding in any way and that each lawyer should establish his own fees based on considerations of time, experience, etc. We understand that after this matter has been discussed by the Association and

its committees this Fall you will advise us of any further measures taken by the Association.

Sincerely yours,

Donald F. Turner
Acting Assistant Attorney General
Antitrust Division

By /s/ Lewis Bernstein
Lewis Bernstein
Chief
Special Litigation Section

MOTION FILED
SEP 18 1974
Supreme Court, U.S.
FILED
SEP 18 1974
MICHAEL RODAK, JR.

In The

Supreme Court of the United States

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF RESTON, VIRGINIA HOMEOWNERS,

Petitioners,

v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

MOTION TO DISMISS ON BEHALF OF THE VIRGINIA STATE BAR

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Deputy Attorney General

STUART H. DUNN
Assistant Attorney General

Supreme Court–State Library Building
1101 East Broad Street
Richmond, Virginia 23219

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2. Whether The Virginia State Bar, An Administrative Arm Of The Virginia Supreme Court, Is Immune From Suit On Account Of The Eleventh Amendment Of The United States Constitution? 1

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In The

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LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
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MOTION TO DISMISS ON BEHALF OF THE VIRGINIA STATE BAR

QUESTIONS PRESENTED

1. **Whether The Action Of The Virginia State Bar, An Administrative Agency Of The Supreme Court Of Virginia, In Distributing Minimum Fee Reports And In Issuing Opinions With Respect To Ethical Conduct Of Attorneys, Constitutes "State Action" Exempt From Federal Antitrust Laws?**

2. **Whether The Virginia State Bar, An Administrative Arm Of The Virginia Supreme Court, Is Immune From Suit On Account Of The Eleventh Amendment Of The United States Constitution?**

STATEMENT OF THE CASE

Respondent, Virginia State Bar, agrees substantially with the statement of the case by the Goldfarbs. To the extent that it disagrees, *e.g.*, with respect to their comparison of the minimum fee reports of the State Bar with the minimum fee schedule of the Fairfax County Bar Association, these matters will be addressed in argument.

Additionally, the following facts are pertinent to a consideration of the nature of the Virginia State Bar, although they are inclusive of some previously stated by petitioners.

The State Bar is an administrative agency of the Supreme Court of Virginia created by the Supreme Court of Virginia pursuant to the laws of Virginia, including § 54-49, Code of Virginia (1950), as amended. The Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operations of the State Bar which are found in §§ II and IV of Part VI of the Rules of the Supreme Court. (Stip. 9; App. A, p. 17[1]).

The powers of the State Bar have been delegated to the council of the State Bar, which is comprised of one or more[2] persons from each judical circuit in Virginia, six persons appointed at large by the Supreme Court of Virginia, and the president, president-elect and immediate past president, all of whom serve as *ex officio* members. (Stip. 10; App. A, pp. 17-18).

Each attorney practicing law in Virginia is required by statute and by court rule to be a member of the State Bar. The State Bar is required by statute and rule to investigate alleged violations of the standards of conduct mandated by the Supreme Court Rules, and to report its findings to a

[1] Since petitioners have set out the stipulations in their brief, respondent will reference that appendix, rather than the record below.

[2] Since the institution of this action, there has been a minor amendment of the Rules.

court of appropriate jurisdiction for further disciplinary proceedings. (Stip. 11; App. A, p. 18).

The Supreme Court has delegated to the State Bar responsibility for investigating complaints of unprofessional conduct of any member of the State Bar. Such investigations are carried out by district committees which are comprised of attorneys. There is such a committee organized in each of the ten congressional districts of Virginia. (Stip. 22; App. A, p. 20).

Pursuant to § 54-52 of the Code, the funds for operation of the State Bar are appropriated from a special fund of the State Treasury by act of the General Assembly. The special fund in the State Treasury consists of fees paid by members of the State Bar, the amounts of which are set, pursuant to statute, by the Supreme Court. (Stip. 12; App. A, p. 18).

The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on matters involving questions of ethics. (Stip. 16; App. A, p. 19). The Supreme Court of Virginia has stated that suggested fee schedules and economic reports of the State Bar and of local bar associations involve questions of ethics. (Stip. 18; App. A, p. 19). The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on questions of ethics, such as Opinions 98 and 170 which relate to minimum fee schedules, and to disseminate minimum fee schedule reports. (Stip. 19; App. A, p. 19).

In 1962 and 1969, attorneys who were members of the State Bar prepared on behalf of the State Bar minimum fee schedule reports. (Stip. 14; App. A, p. 18). Minimum fee schedules of some type are published and circulated in at least thirty-four states and in the District of Columbia either by the voluntary bar or by a counterpart of the State Bar. (Stip. 26; App. A, p. 20).

The State Bar has never received a communication from the respondent local bar association regarding the professional conduct of any member of said association or any member of the State Bar, including failure of such members to follow a minimum fee schedule. (Stip. 24; App. A, p. 20). The State Bar has never received a communication from any person regarding the professional conduct of any member of the State Bar with respect to minimum fee schedules. (Joint Appendix, p. 113). The State Bar has never initiated or participated in any administrative or judicial action against an attorney for failure to adhere to a minimum fee schedule. (Stip. 25; App. A, p. 20).

Virginia attorneys who provided legal services to prospective home buyers in Reston, Virginia, are specifically prohibited by the Code of Professional Responsibility promulgated by the Supreme Court of Virginia from advertising their services or their charges for these services either within or without the State of Virginia. (Stip. 23; App. A, p. 20).

ARGUMENT

A.

State Action

The seminal case with respect to "state action" is *Parker* v. *Brown,* 317 U.S. 341 (1943). The case involved an interpretation of the applicability of the Sherman Act to the actions of a State agency. The following language is instructive:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from

> activities directed by its legislature." 317 U.S. at 350-351.
>
> * * *
>
> "There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.' " 317 U.S. at 351.
>
> * * *
>
> "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." (Citation omitted.) 317 U.S. at 352.

As far back as 1895, it was ruled that a state was not a "person" who could violate the Sherman Act. *Lowenstein* v. *Evans,* 69 F. 908 (C.C.D.S.C. 1895). This Court subsequent to *Parker* had another opportunity to consider the "state action" exemption to the Sherman Act in *Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), which held that efforts to restrain trade by obtaining passage of laws was "state action" within the meaning of *Parker*. Therein the Court stated:

> ". . . the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where restraint upon trade or monopolization is a result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U.S. at 135-136.

The common thread weaving its way through *Parker* and *Noerr* is that the State cannot be held responsible for a violation of the Sherman Act.

The Court of Appeals applied to the State Bar those guidelines set out in *Parker* to determine whether antitrust immunity has been conferred upon private persons. (497 F.2d 1, 6-12; Pet. Brief, App. B, pp. 6-12). Based upon such analysis, the Court found that the State Bar was exempt. (497 F.2d at 12; Pet. Brief, App. B, p. 12). While the decision was correct, it was not necessary for the Court to undertake such an approach. Since the State Bar is a state agency, the Court should simply have concluded that it was not capable of violating the Sherman Act for the reasons previously stated.

As to this proposition, there is no conflict among the circuits. Petitioners cite two cases for the proposition that governmental officials are not necessarily immune. (Brief, p. 28). Neither, however, are dispositive of the instant case. Both *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), and *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011 (3rd 1971), involved situations where the courts found that no antitrust immunity had been conferred upon private parties. Neither involved findings that the governmental defendants were liable for violation of the Sherman Act, the relief sought here. There is simply no conflict among the federal courts as to the issue that injunctive relief and damages will not issue against a state agency under the Sherman Act.

Moreover, the role of the State Bar has been an extremely minor one in any event. While it published fee reports, this is clearly a very incidental part of the action complained of in that they are not binding, but are mere guidelines for

localities and in fact, were not adopted in their entirety by the Fairfax County Bar Association, even as to the title examination fees.[3] It is further significant that in rendering the opinions complained of and in publishing the minimum fee reports, the State Bar is carrying out its statutory responsibility; it is not acting in a commercial or proprietary capacity.

B.

Sovereign Immunity

The Eleventh Amendment to the Constitution of the United States reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens who are subjects of any foreign state." *U.S. Const. amend. XI*

In *Hans* v. *State of Louisiana*, 134 U.S. 1 (1890), it was held that in the absence of waiver, actions against a state by a fellow citizen were prohibited as well as actions by citizens of different states. An early exception to this rule was created in *Ex Parte Young*, 209 U.S. 123 (1907),

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[3] A comparison of page 11 of the Virginia State Bar minimum fee schedule report of 1969 (Exh. 27; J.A. 70) with page 25 of the Fairfax Bar Association minimum fee schedule of 1969 (Exh. 29; J.A. 84) reveals (a) that there is a minimum title examination fee of $100 under the Fairfax schedule while there is a minimum fee for title examination of $75 under the State Bar report, (b) the Fairfax schedule provides for a fee of one-half of one percent of the amount of loan or purchase price, whichever is greater, from $50,000 to $100,000 and one quarter of one percent of the loan amount or purchase price, whichever is greater, from $100,000 to $1,000,000, while the State Bar report provides for a fee of one-half of one percent of the loan amount of purchase price from $50,000 to $250,000 with any amount over $250,000 of loan amount or purchase price to be reached by negotiation or agreement.

wherein the Court held that immunity did not extend to action being taken pursuant to an unconstitutional statute or action taken outside of the authoriy of the governmental agent in question, which exception is generally known as the *ultra vires* exception. There is no allegation that the Virginia State Bar was acting pursuant to an unconstitutional statute, nor that it exceeded its authority.

Additionally, a state may waive its sovereign immunity, *see e.g. Parden* v. *Terminal Railway of Alabama State Docks Department,* 377 U.S. 184 (1964). This Court has made clear, however, in two recent cases that any such waiver intended by Congress must be explicit. It will not be presumed to have acted silently. See *Employees of Department of Public Health and Welfare* v. *Missouri,* 411 U.S. 279 (1973) and *Edelman* v. *Jordan,* 94 S.Ct. 1347 (1974). Congress has not only failed to indicate that a state shall be deemed to have waived its sovereign immunity for purposes of the Sherman Act; but, as previously stated, as far back as 1895, it was ruled that a state was not a "person" within the meaning of the Sherman Act.

Since the State Bar is a state agency and since any judgment would have to be paid from the State Treasury, it is manifest that the State Bar enjoys sovereign immunity in this action.

CONCLUSION

If minimum fee schedules are found to violate the Sherman Act, there would be no necessity for enjoining the State Bar from utilizing them in a determination as to whether unprofessional conduct has occurred. Further, no damages could be assessed against the State Bar. If the Court of Appeals was correct, certiorari should be denied.

In either event the State Bar should properly be dismissed as a defendant and a writ of certiorari as to it should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB,
individually and as Representatives of the Class of Reston,
Virginia Homeowners,

Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

On September 18, 1974, the respondent Fairfax County Bar Association ("Fairfax") served and filed its brief in opposition to the granting of the petition herein. Reproduced on page 1 of the Appendix to that brief is a copy of a Resolution adopted two days earlier by Fairfax rescinding its minimum fee schedule, which has been challenged by

petitioners in this action, and stating its intention not to reinstitute any such schedule in the future. Based upon this Resolution, Fairfax claims that petitioners' request for injunctive relief is moot. It also argues that its liability should be prospective only, and thus petitioners' claim for damages should be dismissed and the petition denied.

ARGUMENT

Petitioners do not question the sincerity of Fairfax's assurance that it will not issue any further fee schedules, and therefore agree that there is no need for injunctive relief against Fairfax. However, petitioners' request for injunctive relief against the State Bar is not moot because the State Bar has not made any changes in its two practices challenged in this case. Thus, the State Bar has not withdrawn Opinions 98 and 170 under which the failure of an attorney to abide by minimum fee schedules can result in sanctions being imposed against him. Even more important is that the State Bar issued two fee reports containing suggested local minimum fee schedules which were adopted almost without change by local bar associations throughout Virginia, including Fairfax. If those reports are not withdrawn, attorneys will be free to adhere to the fees set forth in them, rather than those in the virtually identical schedules of their local bar associations. In fact, unless the decision of the Court of Appeals is reversed, the State Bar will be able to issue a new fee report with a schedule of fees for each locale, just as it did in 1969 when, as the report itself acknowledged, the changes from its 1962 report reflected "a general scaling up of fees for legal services." App. 3, Brief of Fairfax. Therefore, it is clear that the need for injunctive relief against the State Bar is not affected by Fairfax's action on September 16th.

Quite apart from the prayer for injunctive relief, petitioners have sought damages on behalf of a certified class of 2400 homeowners, and it is undisputed that the rescission of the fee schedule cannot moot that claim. Fairfax recognizes this fact, but seeks to have the damage claim dismissed on the ground that there should be only prospective relief in this case even if liability is established. In effect, Fairfax seeks an adjudication on the prospectivity issue by this Court before any decision is made either to grant certiorari or on the merits. We submit that Fairfax's reasoning is flawed and should be rejected by this Court.

The first time that Fairfax suggested that relief in this action should be prospective only was after the decision by the District Court holding that Fairfax violated the antitrust laws. After hearing oral argument on Fairfax's motion, the District Court denied the application to limit the effect of its decision to prospective relief only. Fairfax extensively briefed that issue on its appeal to the Fourth Circuit, but the question was never reached, because the Court held that Fairfax had not violated the antitrust laws. Accordingly, we suggest that this Court should not pass on the question of prospectivity until the Court of Appeals has decided that issue, an occurrence which cannot take place until this Court reverses the decision of the Court of Appeals dismissing the complaint.* Thus, unless the petition is granted, petitioners will also be out of court on their damage claims, which are clearly not moot.

Moreover, there is no merit to the contention of Fairfax that liability should be applied only prospectively. This

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* Similarly, the Eleventh Amendment contentions of the State Bar (Motion to Dismiss, pp. 7-8), which apply only to the claim for damages, were not decided in the Court of Appeals or the District Court and should not be decided by this Court in the first instance.

Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), demonstrates the very narrow range of cases where the doctrine of prospectivity will apply in the antitrust area:

> There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. *Id.* at 496.

This Court further declared that the doctrine of prospectivity applied only where a decision adopted "a radically new interpretation of the Sherman Act" *id.* at 497, or where there was "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one." *Id.* at 498. Judged by these standards, it is apparent that there is simply no basis to sustain a plea for prospective application only, with its attendant denial of damages to petitioners who have been victimized by violations of the Sherman Act. See also *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969).

CONCLUSION

The recent decision of the Fairfax County Bar Association to rescind its minimum fee schedule does not render this case moot because of the continuing viability of petitioners' claim for injunctive relief against the Virginia State Bar and the claim for damages against both respondents.

All of the grounds set forth in the petition as a basis for granting the writ still apply, and we accordingly submit that it should be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1974

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia Homeowners,

Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court and its findings of fact are reported at 355 F. Supp. 491, and set forth at pages 1-15 of Appendix A to the petition for a writ of *certiorari*.[1] The Stipulation of Facts agreed to by the parties is not officially reported but is set forth at pages 16-20 of

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[1] References to the appendices accompanying the petition will designate the particular appendix and the page in it, and will be in this form "App. ___, p. ___." References to the Single Appendix will have the page preceded by "A."

that Appendix. The opinion of the Court of Appeals is reported at 497 F.2d 1, and set forth as Appendix B to the petition.

JURISDICTION

The judgments of the Court of Appeals were entered on May 8, 1974. The petition for a writ of *certiorari* was filed on August 5, 1974, and was granted on October 29, 1974, with Mr. Justice Powell taking no part in the consideration or decision of the matter. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Are bar associations which promulgate a minimum fee schedule exempt from the price fixing prohibitions of the antitrust laws because the restraint on competition is among the members of a "learned profession"?

2. Does a restraint of trade by attorneys in the fixing of fees for title examinations in connection with obtaining mortgages on real estate in Northern Virginia, substantially restrain commerce among the several States, where the undisputed evidence shows that a substantial portion of these mortgages involve (a) loans made from persons outside of Virginia, and/or (b) guarantees by agencies of the Federal Government headquartered in Washington, D.C., and/or (c) the purchase of a home by a non-resident of Virginia?

3. Is the Virginia State Bar exempt from the antitrust laws under the doctrine of *Parker v. Brown* for its role in a price fixing arrangement utilizing minimum fee schedules even though there is no statute authorizing the promulga-

tion of such schedules, and where the only independent state agency involved, the Virginia Supreme Court, did not approve either the fee schedules themselves, the reports of the State Bar which led to their adoption, or the opinions of the State Bar which provided the enforcement mechanism for obtaining adherence to such schedules?

STATUTES INVOLVED

The principal statute involved, the Sherman Antitrust Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

The relevant statutes of the Commonwealth of Virginia are set forth in Addendum A to this brief.

STATEMENT

A. FACTS

On October 26, 1971, the named plaintiffs in this action, Lewis H. and Ruth S. Goldfarb, contracted to purchase a $54,500 home in Reston, Virginia. The contract provided that the closing would take place at the offices of A. Burke Hertz, a Virginia attorney, who maintained his office in Falls Church which, like Reston, is in Fairfax County (App. A, p. 16).

As a condition of obtaining a mortgage for their home, the Goldfarbs were required to obtain title insurance to

cover the mortgagee's interest (Exhibit 32, ¶15, sec. 7).[2] Under ethical opinions issued by the Virginia State Bar, the giving of an opinion as to the state of a title to real property cannot be done by a title insurance company but must be done by a private attorney.[3] Therefore, on November 23, 1971, the Goldfarbs wrote Mr. Hertz concerning the possible utilization of his services to perform the required title examination, as well as for other matters relating to the purchase of their home (Exhibit 2). Their letter indicated a desire to minimize the cost of obtaining title insurance and noted that their realtor had estimated that an attorney would charge them approximately $522 for the title examination alone, the amount as determined by the fee schedule of the local bar associations. On December 8, 1971, Mr. Hertz replied, indicating that it was "the policy of this office to keep our charges in line with the minimum fee schedule of the local Bar Association" (Exhibit 3).

Thereafter, the Goldfarbs sent letters to 36 other attorneys in Northern Virginia to inquire about fees for title examination services (Stip. ¶6, App. A, p. 17). Nineteen written replies were received (Exhibits 6-24), all of them indicating adherence to the fee schedule not only by the responding attorney, but by other members of the bar as well. For example, one stated that attorneys are "not permitted to actively solicit legal business, and any attorney who would reduce his fee for title examination in

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[2] References to Exhibits are to the Exhibits admitted in evidence, with numbers 1-32 having been admitted by stipulation. References to Exhibits, which are reproduced in the Single Appendix, will include the appropriate pages in that document.

[3] See Unauthorized Practice of Law Opinion No. 17, August 5, 1942, Virginia State Bar – Opinions 239 (1965 ed.)

order to obtain your business would, in my opinion, run afoul of the 'no-solicitation' rule" (Exhibit 6). The same attorney also indicated that he knew of "no attorney who charges less than the recommended fee schedule for title examinations" and that his title examination fees followed the recommended fee scale adopted by the bar association. Another attorney phrased his reply this way:

> The Fairfax County Bar Association has established a minimum fee schedule which in effect establishes the fees charged for title examination in Fairfax County.
>
> * * *
>
> My fee for title examination would be the same as those figures quoted you. I feel I am ethically required to adhere to the fee schedule of the Fairfax County Bar due to the lack of any special relationship, this should be true for any other attorney [sic] (Exhibit 9).

Other references were to the "standard Bar rate" (Exhibit 8) and to the fact that "all attorneys in this area use the minimum fee schedule in real estate settlement cases" (Exhibit 11), and that fees are "determined by a minimum fee schedule" (Exhibit 18). Other replies (Exhibits 10, 13, 14, 15, 16, 21, and 24) demonstrated adherence by that attorney and all others in the area to the fees set forth in the minimum fee schedule. In short, Mr. Hertz's prices were no better and no worse than any other attorney who replied.

Therefore, at the January 15, 1972, closing on their house, the Goldfarbs utilized the services of Mr. Hertz and were charged $522.50 for a title examination – precisely the amount calculated under the minimum fee schedule –

plus $196 for the title insurance itself. In addition, they paid Mr. Hertz $25 for preparation of title insurance documents, $30 for a deed of trust and a note, $30 for the deed, and $30 for a closing fee (Exhibit 25). All of these charges were also the exact amounts set forth on the minimum fee schedule (Exhibit 29, pp. 26-27, A. 41-42). Thus, by virtue of the minimum fee schedule, Mr. Hertz received $637.50 from the Goldfarbs for services relating to the purchase of their home.

The minimum fee schedule referred to by these attorneys was promulgated in 1969 by the respondent Fairfax County Bar Association in conjunction with the bar associations of Loudoun and Arlington counties and the City of Alexandria (Exhibit 29, A. 37-44). For title examinations, the minimum fee is 1% of the first $50,000 of the loan or purchase price, whichever is greater, one-half of one percent from $50,000 to $100,000, one-quarter of one percent between $100,000 and $1,000,000 and a negotiated amount thereafter (Exhibit 29, p. 25, A. 40).

The requirement of adherence to these minimum fee schedules is imposed by the Virginia State Bar. The State Bar, which was created by the Virginia Supreme Court pursuant to statutory authority,[4] is an integrated bar, meaning that every attorney licensed to practice in Virginia must be a member of it and pay annual dues to it (Stip. ¶¶ 9 and 11, App. A, pp. 17-18). Pursuant to § 54-52 of the Virginia

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[4] Virginia Code § 54-49 (1972 Repl. Vol.). After the trial in this action, the provisions of the Virginia Code relating to the Bar were amended in certain minor respects, none of which is relevant to this case. Accordingly, we will refer to the statutes as in effect in 1972, which is the version set forth in Addendum A to this brief.

Code, the money used to operate the State Bar is appropriated from a special fund in the State Treasury by act of the General Assembly. This special fund consists entirely of dues paid by members of the State Bar in accordance with a schedule which the Supreme Court establishes pursuant to its statutory authority to do so, Virginia Code § 54-50 (Stip. ¶ 12, App. A, p. 18). In contrast, the local bar associations, which actually publish the fee schedules, are purely voluntary organizations of attorneys who practice in a particular locality (Stip. ¶ 13, App. A, p. 18).

The Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operation of the State Bar. The State Bar is required by statute and court rule to investigate alleged violations of these standards of conduct and to report its findings to a court of appropriate jurisdiction which undertakes any disciplinary proceedings (Stip. ¶ 11, App. A, p. 18). Relying upon the authority given to it by the Virginia Supreme Court to issue opinions on questions of ethics, the State Bar has issued Opinions 98 and 170 (Exhibits 30 and 31, A. 45-48) which, in substance, state that it is unethical for an attorney habitually to charge fees below those suggested in a minimum fee schedule, and that sanctions may be imposed by the State Bar against an attorney who violates that ethical proscription. Thus, the threat of sanctions for a violation of Opinions 98 and 170 stands behind the minimum fee schedules promulgated by the local bar associations.

In addition, the State Bar issued reports on the subject of minimum fee schedules in 1962 and 1969 (Exhibits

26 and 27, A. 19-28).[5] Those reports included suggested local fee schedules that were the basis for the minimum fee schedules adopted and published by the local bar associations. In fact, the suggested fees for title examination adopted by the Fairfax County Bar Association in both 1962 and 1969 (Exhibits 28 and 29, A. 29-44) were virtually identical to those suggested in the State Bar Reports.

Two further facts concerning the role of the Virginia Supreme Court with regard to minimum fee schedules are important in this action. First, the statutes which give that Court the authority to organize and regulate the State Bar are general in nature and make no mention whatsoever of minimum fee schedules or of controlling the pricing decisions of individual attorneys (see Addendum A to this brief). In fact, the only possible relevant statute among them is section 54-51, but that specifically limits the power of the Virginia Supreme Court to adopt ethical rules or regulations to those which are not "inconsistent with any statute. . . ." Second, the Virginia Supreme Court has never held a formal or even informal proceeding of any kind with respect to the lawfulness of fee schedules under Virginia or federal law, nor do the Virginia statutes provide for any such proceeding. Thus, it has never specifically passed on the 1962 and 1969 Fee Reports of the State Bar, the 1962 and 1969 minimum fee schedules issued by the local bar associations as recommended in those Reports, or Opinions 98 and 170 which provide the means of securing adherence

[5] The 1962 Fee Report was prepared by the Bar's Committee on Economics of Law Practice. In 1969 the work was done by the Committee on Professional Efficiency and Economic Research, which described itself as a "similar committee" to the one which issued the 1962 Report (Exhibit 27, p. 3, A. 25).

to the local fee schedules. The sole references to minimum fee schedules in any rule or regulation issued by the Virginia Court are in Canon 12 of the now-repealed Canons of Professional Ethics, 171 Va. *xvii, xxiii,* adopted October 21, 1938, and Ethical Consideration 2-18 of the current Code of Professional Responsibility, 211 Va. 295, 302, adopted October 13, 1970, effective January 1, 1971. In discussing the question of an appropriate fee, the Canon states that one relevant factor is " . . . the customary charges of the Bar for similar services," and then goes on to note that in determining such charges ". . . it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association . . ." (App. A, p. 9). The Ethical Consideration simply states that "[s]uggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees." *Id.* In both instances these provisions were adopted verbatim from the Canons/Code prepared by the American Bar Association and adopted by it on July 9, 1924, and August 12, 1969, respectively.

B. PROCEEDINGS IN THE DISTRICT COURT

On February 22, 1972, the Goldfarbs filed suit in the United States District Court for the Eastern District of Virginia, Alexandria Division, on behalf of themselves and a class of persons who had purchased homes in Reston, Virginia, during the four-year period preceding the filing of the complaint, and who had been unlawfully charged title examination fees in accordance with the minimum fee schedule. Named as defendants in this action were the Virginia State Bar and the bar associations of Fairfax and Arlington counties and the City of Alexandria (A. 5-16).

The complaint alleged that the defendants had violated the Sherman Antitrust Act, 15 U.S.C. §1, by the operation of the minimum fee schedule system, under which adherence by attorneys to the schedule promulgated by the local bar associations was compelled by the State Bar. The State Bar's compulsion was brought about by its issuance of Opinions 98 and 170, which, in effect, threatened attorneys with disciplinary proceedings if they did not follow the fee schedule. In addition, the complaint alleged that the issuing of the 1962 and 1969 State Bar Reports, which led to the promulgation of the virtually identical local bar association minimum fee schedules, also made the State Bar a co-conspirator. Petitioners contended that, as a result of the minimum fee schedule system, the members of the plaintiff class had been overcharged for title examinations in connection with the purchase of their homes. The complaint asked for treble damages, as well as declaratory and injunctive relief against the continued operation of the minimum fee schedule system.

After discovery was conducted, a pre-trial conference was held at which it was agreed to sever the trial on liability from that on damages. On September 28, 1972, the District Court, without objection by the respondents, certified this action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure and, after extensive oral argument, denied the motions of the defendants for summary judgment. (A. 2).[6] Thereafter, petitioners entered into a settlement with the defendants Alexandria Bar Association and Arlington County Bar Association, under which those two associations agreed to withdraw their fee schedules, to advise their members of the withdrawal, and to refrain from publishing any minimum or suggested fee schedules

[6] Petitioners sent individual notice to the approximately 2400 members of the plaintiff class, and additional notice by publication in the *Reston Times* was also given.

in the future, in exchange for which all damage claims against the two associations were dismissed with prejudice. On December 11, 1972, after notice to the members of the plaintiff class had been sent, the District Court held a hearing pursuant to Rule 23(e) of the Federal Rules of Civil Procedure and approved the settlement. Two days later the trial was held.

The trial took less than half a day because the bulk of the facts had been agreed upon by stipulation of the parties. The defendants renewed their contentions previously made by motion that there was no liability on their part because (1) there was an insufficient connection between the activities of defendants and interstate commerce, (2) lawyers, as members of a learned profession, were exempt from the Sherman Act, and (3) their actions were those of the State and hence immune under *Parker v. Brown,* 317 U.S. 341 (1943). In addition, the Fairfax Bar argued that the minimum fee schedule system did not violate the antitrust laws and that petitioners were not damaged by that system. Following the submission of proposed findings of fact, conclusions of law, and post-trial memoranda, the District Court issued its memorandum opinion and made findings of fact (App. A). It ruled that the defendant Fairfax County Bar Association had violated the antitrust laws and was liable for damages to the members of the plaintiff class, but found on *Parker v. Brown* grounds that the State Bar was not liable, although it had previously rejected that defense when it was raised in a motion for summary judgment.

The Court first ruled that the operation of the minimum fee schedule system was "a form of price fixing and therefore inconsistent with antitrust statutes prohibiting anti-competitive activities." (App. A, p. 3). It specifically declined to create an exemption for the pricing practices of attorneys, noting that "fee setting is the least 'learned' part of

the profession" (App. A, p. 5). From the evidence which showed that the rates charged for title examinations were not in most cases based on factors other than the minimum fee schedule, and from the evidence concerning the efforts of the Goldfarbs to obtain legal services at rates below the fee schedule amounts, the Court concluded that there was significant adherence to the fee schedule (Findings 6-8, App. A, p. 8), which resulted in damage to the Goldfarbs (App. A, p. 4).[7]

As for the commerce issue, the trial judge concluded that, with respect to real estate transactions in Northern Virginia, and particularly in Fairfax County, a significant amount of interstate commerce was affected by the use of these schedules. Based upon what the Court considered to be "a fair sampling of loans made on real estate in Fairfax County" (App. A, p. 4), it found that more than half of the money loaned came from out-of-state sources. Plaintiffs' witness, a retired Army Colonel and a member of the Virginia Bar, had examined one of every ten chronological deed books for the years 1970 and 1971 for Fairfax County. This examination showed that for this sample alone more than $75,600,000 of the $136,281,121 in loans came from out-of-state, with the source of $12.8 million not determinable from the deed books (Finding 2, App. A, p. 7).[8] In addition, the Court relied on the fact that millions of dollars of loans guaranteed by the United States Veterans Administration and United States Department of Housing and Urban Development, both of which

[7] The District Court specifically declined to make a finding as to the amount of damages sustained since that question had been severed from the trial on liability (App. A, p. 3, note 4).

[8] Because of the possibility that the larger deeds of trust were for commercial property, another computation was made eliminating all deeds of trust above $100,000. Of the approximately $77,000,000 that remained in the sample, the in-state and out-of-state were nearly equally divided *(id.)*.

were headquartered in the District of Columbia, had been made in the Northern Virginia area, with particularly large amounts for Fairfax County in the years 1968-72 (App. A, p. 4; Findings 3 & 4, App. A, p. 7). The Court also noted the large percentage of persons who live in Fairfax County but who work outside Virginia (App. A, p. 4), and found that substantial numbers of persons who had lived outside of Northern Virginia in 1965 had moved into Northern Virginia by the year 1970 (Finding 1, App. A, pp. 6-7). Accordingly, the Court concluded that the requirement of "commerce among the several states" in 15 U.S.C. §1 had been met.

The final defense raised was that defendants' conduct was immune under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). With respect to the defendant Fairfax County Bar Association, the Court rejected this argument, noting both the voluntary nature of the association and the fact that the group freely adopted the minimum fee schedule (App. A, pp. 5-6). The Court stated that the "fact that the State furnishes a vehicle for its enforcement upon complaint does not extend immunity to the local bar association" (App. A, p. 5).

The Court refused, however, to hold the State Bar liable for what the Court described as "its minor role in this matter" (App. A, p. 6). It found that the actions taken by the Bar were within the scope of its statutory or rule-created authority and hence were actions of the State and not those of private persons (*Id.*). It noted that there had never been any action taken by the State Bar to discipline an attorney for charging less than the minimum fee schedule and that, in view of the declaration of illegality of the fee schedule of the local bar association, any need for injunctive relief against the State Bar was removed (*Id.*).

As to petitioners' claim for damages, the District Court noted the stipulation that the State Bar is "an administrative agency of the Supreme Court of Virginia" (Stip. ¶ 9, App. A, p. 17) and stated that "such an agency was surely never intended to be included among those liable for damages under 15 U.S.C. § 15" (App. A, p. 6). Thus, without reaching the claim of the State Bar that the Eleventh Amendment to the United States Constitution precluded the maintenance of any damage action in federal court against the Bar, the District Court held that the State Bar was not liable for damages under the statute. Because the Court's opinion had made no specific determination of the lawfulness of the State Bar's promulgation in 1962 and 1969 of Fee Reports containing suggested fee schedules, petitioners moved pursuant to Rule 52(b) of the Federal Rules of Civil Procedure to amend the findings and to have the District Court deal specifically with that question. The Court denied that motion, indicating that the prior decision had implicit in it the rejection of plaintiffs' contention that the publishing of those Reports was in some way different from the issuance of Ethical Opinions. Thus, although the local bar associations could no longer publish fee schedules, the State Bar was left free to issue an updated "Report," with suggested fee schedules in it, that could resurrect the use of the same schedules, except that they would be issued by the State Bar and not the local bar associations.

In addition to petitioners' post-trial motion, the Fairfax County Bar Association also sought to amend the Court's opinion to make it prospective only, and thus to foreclose petitioners from recovering their damages. This contention, which was not contained in any pleading or any proposed finding of fact or conclusion of law, was rejected by the

Court at a hearing held on February 2, 1973, and again on February 28, 1973, based upon Fairfax's renewed motion for the same relief (A. 3-4). At that February 2nd hearing, the Court entered an order, the form of which had been agreed to by the parties, enjoining the further enforcement or use of Fairfax's minimum fee schedule. That order contained an appropriate direction pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and stayed all further proceedings in the District Court until the appeals of petitioners and the Fairfax County Bar Association could be decided by the Fourth Circuit (A. 17-18).

C. THE DECISION IN THE COURT OF APPEALS

The Court of Appeals, with Senior Circuit Judge Boreman writing for the majority, affirmed that part of the District Court's decision granting immunity to the State Bar, but reversed the judgment entered against the Fairfax County Bar Association, holding that the activities involved were immune under a "learned profession" exception to the antitrust laws and that there was an insufficient showing of an effect upon interstate commerce to sustain jurisdiction under the Sherman Act.

Initially, the majority discussed the applicability of the state action doctrine of *Parker v. Brown* to the State Bar. It correctly identified the three *Parker* requirements of a legislative command limiting competition, the presence of an agency of the State, and the vesting of authority for the final decision with that State agency rather than with a private person. With respect to the requirement of a "legislative command" to engage in the particular activities, the Court focused on section 54-48 of the Virginia Code, which authorizes the Virginia Supreme Court to promul-

gate rules and regulations defining the practice of law and prescribing a code of ethics and procedures for disciplining attorneys. The Court of Appeals observed that the "desired goal of the Code of Professional Responsibility is to benefit clients and the public in general. . ." and that it would be "manifestly unfair to dissect a state's regulatory program into its various component parts, parts that were meant to interrelate, and then to declare that because some factors may benefit those to be regulated, the program falls outside the *Parker* exemption" (App. B, p. 10). Based upon this analysis, the majority concluded that the Virginia Code "gave the Virginia Court the power to restrict competition among those in the legal profession" since it was the "Virginia legislature that created the machinery for regulation" (App. B, p. 12). The majority reached this conclusion despite the fact that there is not a word in any of the Virginia statutes which even mentions minimum fee schedules or restrictions on competition, much less which sanctions their use.

Turning to the second *Parker* condition – the presence of a state agency – the Court declined the invitation of the State Bar to rule that the Bar, which is comprised wholly of lawyers, could create antitrust immunity for itself by its approval of its own activities (App. B, p. 11). It did hold, however, that the Supreme Court of Virginia was sufficiently independent to provide the required State agency activity for purposes of *Parker v. Brown.*

As to the final requirement under *Parker,* the Court acknowledged that the Virginia Court must "*actively* supervise the State Bar" (App. B, p. 11, emphasis in original). It observed that the Virginia Court initially gave the authority to the State Bar to issue fee schedules and opinions similar to Opinions 98 and 170 concerning adherence to

such schedules, and that the Court officially adopted the Code of Professional Responsibility, which in discussing the proper method of setting fees mentions the use of local fee schedules (See App. A, p. 9). It also noted that the Virginia Court has employed suggested fee schedules in establishing attorney's fees in cases before it.

However, the most important aspect of the immunity determination was the Court's reliance on its earlier decision in *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (1971). The Court there held that inaction by the state utility commission with regard to a proposal before it did not necessarily constitute a lack of active supervision required for immunity, on the theory that it is "just as sensible to infer that silence means consent, *i.e.* approval." *Id.* at 252. The majority below thereupon concluded that because the Virginia Court "has the authority to regulate and supervise the State Bar[,] we will not infer abandonment of that authority because of claimed inactivity. The active independent state supervision required in *Parker* is provided here by the Virginia court" (App. B, p. 11).

In his dissenting opinion, Judge Craven, who was the author of the *Washington Gas Light* opinion, observed that the Virginia Supreme Court "will be surprised to learn that it is engaged in *active* supervision of the State Bar's implementation of minimum fee schedules in Virginia. I find nothing in the record to suggest that the Virginia court even knew that the Fairfax County Bar Association had a minimum fee schedule, or that it approved it either directly or indirectly through the State Bar" (App. B, p. 21, emphasis in original). Judge Craven, however, went on to exonerate the State Bar because of its "exceedingly 'minor role'" in this matter (App. B, p. 21). In his view,

the State bar did no more than suggest the adoption of minimum fee schedules by local bar associations and circulate reports on the schedules that were adopted.[9]

No member of the panel found that *Parker v. Brown* protected the Fairfax County Bar Association, and thus it was necessary to examine the other defenses since the court found it "abundantly clear . . . that the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County" (App. B, p. 13). The majority then determined that there is a limited exemption from the antitrust laws for the "learned professions," relying on two cases[10] which "hold" that one engaged in the practice of a profession does not follow a trade and that his activities are not the subject of commerce (App. B, p. 13 and notes 33 and 34). In explaining its ruling, it observed that the occupation of one who violates the Sherman Act is irrelevant, but that there must be a restraint upon trade or commerce (App. B, p. 15). The majority then stated that a restraint upon the interstate sale of health insurance would be unlawful,[11] but that "if a group of doctors con-

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9 In discussing the involvement of the State Bar, Judge Craven made no mention of the stipulated facts that the State Bar Reports were the basis of the local fee schedules and that the existence of Opinions 98 and 170 is a "substantial influencing factor" in the adherence by Virginia lawyers to such fee schedules (Stip. ¶¶15 & 20, App. A, pp. 18-19).

10 *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 653 (1931); and *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922). The Court also cited *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 573 (1944) (dissenting opinion of Chief Justice Stone).

11 Citing *American Medical Ass'n. v. United States*, 317 U.S. 519 (1943).

spire to restrain the practice of another doctor there is no Sherman Act violation because that which is restrained (*i.e.*, the practice of a learned profession, medicine) is neither trade nor commerce."[12] The Court of Appeals thereupon resolved the case before it as follows:

> With that distinction in mind, it should be clearly discernible that the impact of the Association's fee schedule in the instant case upon competition among attorneys for real estate work is not within the Sherman Act. *Id.*

The basis of this distinction was properly rejected by Judge Craven in his dissent (App. B, pp. 23-24), and its applicability to this case is difficult to support since the restraint is not on the legal profession but on the fee-setting practice of lawyers. Nonetheless, the majority observed that "where the restraint is upon the learned profession itself . . . the promulgation of a fee schedule has a sufficient part in the overall scheme devised by the State of Virginia to regulate the legal profession to claim the form of limited immunity to antitrust prosecution available under the 'learned profession' exemption" (App. B, p. 15).

Although the holding on the "learned profession" issue would seem to have disposed of the case, the majority then proceeded to determine that petitioners also had not established a sufficient connection with interstate commerce

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12 App. B, p. 15, citing *Riggall v. Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958).

to make the Sherman Act applicable.[13] The Court focused its attention on the allegations that the restraint occurred in connection with the financing and insuring of home mortgages by inflating a component part of the cost of securing housing. After reviewing the findings of the District Court, the majority concluded that the fact that persons involved in the purchase of these homes worked outside of Virginia is "totally irrelevant" (App. B, p. 16), even though those purchasing the services may have crossed state lines for the sole purpose of doing so. *Id.* citing *Elizabeth Hospital, Inc. v. Richardson,* 269 F.2d 167, 170 (8th Cir.), *cert. denied,* 361 U.S. 884 (1959); *Spears Free Clinic & Hospital v. Cleere,* 197 F.2d 125 (10th Cir. 1952); and *Kallen v. Nexus Corp.,* 353 F. Supp. 33 (N.D. Ill. 1973). It further held that the act of a borrower in securing mortgage money from an out-of-state lender makes neither the selling of the house nor the supplying of incidental legal services, interstate activity (App. B, p. 17). It went on to observe that the "fact that those services are occasionally used by persons who simultaneously engaged in an ancillary interstate transaction to facilitate the conduct of that transaction is merely 'incidental' [and] does not justify Federal regulation of competitive restraints upon a business which is 'wholly local' in character" (App. B, p. 18).

Judge Craven, dissenting, pointed to the findings of the District Court regarding the millions of dollars of out-of-state funds loaned each year for Northern Virginia homes, the interstate guarantees by the Veterans Administration and the Department of Housing and Urban Development,

[13] The majority opinion contains a cryptic sentence which indicates that the learned profession discussion may have been merely *dicta*: "Since that which is allegedly restrained is not a learned profession, the 'learned profession' exemption does not apply here." (App. B, p. 15).

the travel and movement of persons into Northern Virginia, and the large percentage of persons who live in Fairfax County who work outside of Virginia. He concluded that the Northern Virginia housing market "cannot realistically be considered a purely local market" (App. B, p. 22). Relying on this Court's opinions in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219 (1948), and *United States v. Women's Sportswear Mfgs. Ass'n,* 336 U.S. 460 (1949), he concluded that the price-fixing agreement "has a sufficient impact on interstate commerce to come within the Sherman Act" (App. B, p. 22).

D. PROCEEDINGS IN THIS COURT

On August 5, 1974, petitioners filed their petition for a writ of *certiorari* on three questions: the applicability of *Parker-Brown* to the State Bar, the existence of a "learned profession" exemption, and the ruling that a substantial effect on interstate commerce had not been established. Short extensions of time to reply were allowed respondents, and on September 18, 1974, both the Fairfax County Bar Association and the Virginia State Bar filed their responses. The brief of Fairfax indicated that just two days previous to its filing, the Association had voted to rescind its minimum fee schedule and stated its intention not to issue any similar schedules in the future. In light of that development, Fairfax contended that injunctive relief was no longer required and that, since any decision in this case should be applied prospectively only, the controversy was moot. Its brief also urged that the decision of the Court of Appeals was correct on the "learned profession" and interstate commerce questions and that the Fairfax Bar was not subject to liability

because, contrary to the rulings of the Court of Appeals and the District Court, its activities were immune under *Parker v. Brown* and did not constitute price-fixing. The response of the State Bar was in the form of a Motion to Dismiss,[14] urging the correctness of the decision below under *Parker* and also asking this Court to rule that the Eleventh Amendment to the United States Constitution precluded this action insofar as it sought damages from the State Bar.[15]

On September 23, 1974, a motion to file a brief *amicus curiae* was filed by Professor Clark C. Havinghurst of Duke University Law School, urging this Court to grant the writ, and on October 18, 1974, the United States filed a brief *amicus curiae* also supporting the petition. The interest of the United States in this proceeding stems principally from its own case, *United States v. Oregon State Bar*, No. 74-362, (D. Ore.), which was filed the day after the decision in this case was handed down by the Fourth Circuit.

In light of the rescission of the Fairfax County Bar's fee schedule and its claim that the case was now moot,

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[14] But see Rule 24 (2) of this Court.

[15] The Motion is not explicit in limiting its applicability to the damage claim, but throughout these proceedings the Eleventh Amendment defense has been raised by the State Bar only with respect to the prayer for damages and not to the request for injunctive and declaratory relief. In addition, the Motion states (p. 8) that the judgment ". . . would have to be paid from the State Treasury . . ." but makes no mention of any similar problem with injunctive relief and in fact specifically recognizes the applicability of *Ex Parte Young*, 209 U.S. 123 (1907) (Motion, p. 6).

petitioners filed a response pursuant to Rule 24 (4) of this Court. That response pointed out the continuing need for injunctive relief against the State Bar because the Bar previously issued Fee Reports which became the basis of the local schedules and which could supplant them in the future if the State Bar's actions were held to be outside the scope of the antitrust laws. In addition, that response noted that a class of 2400 homeowners in Reston, Virginia had been certified and that their claims for damages could not be mooted by the rescission. Furthermore, as to the contention that relief should be prospective only, petitioners noted that the District Court had denied that application and that the Court of Appeals had not passed on it. Accordingly, we urged that no decision on that question should be made by this Court until the views of the Court of Appeals were received. It was with the case in this posture that this Court, on October 29, 1974, granted the petition and the motion of Professor Havinghurst to file a brief *amicus curiae.*[16] Thereafter, on November 11, 1974, this Court denied the Motion to Dismiss by the State Bar without opinion.

There has also been one further development in the case of *United States v. Oregon State Bar, supra.* The Oregon State Bar, which like respondent Virginia State Bar is an integrated bar, had moved to dismiss the complaint of the United States on the "learned profession" exemption and on *Parker v. Brown,* relying primarily on the opinion of the majority below in this case. On November 22, 1974, Judge Morell E. Sharp of the United States District Court

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[16] Professor Havinghurst has advised counsel for petitioners that he does not intend to file a further brief, but wishes to have his prior brief considered on the merits.

for the Western District of Washington, sitting by designation, denied the motion to dismiss in a careful and well-considered opinion which specifically rejected the analysis of the majority in the Fourth Circuit on both questions. A copy of that decision is appended as Addendum B to this brief.

In addition to the three questions on which *certiorari* was granted, the brief of respondent Fairfax County Bar Association in opposition to *certiorari* argued for non-liability on the grounds that *Parker v. Brown* applies to it, that minimum fee schedules are not a form of price fixing, and that any relief should be prospective only. The State Bar has also sought to interject its defense under the Eleventh Amendment in this Court. Neither respondent filed a cross-petition for *certiorari*, and hence for that reason alone those questions are not properly before this Court. See *Strunk v. United States,* 412 U.S. 434, 437 (1973) and *N.L.R.B. v. International Van Lines,* 409 U.S. 48, 52 n. 4 (1972).[17] Furthermore, the Fourth Circuit has not ruled on either the claim of prospectivity or the defense based on the Eleventh Amendment. In fact, the District Court has not even ruled on the Eleventh

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[17] As to the issues raised by Fairfax other than prospectivity, each of the judges in this case has found them to be without merit. Petitioners, accordingly, rely on the holdings of the lower courts with respect to those arguments. In addition, to the extent that this Court's refusal to consider questions not presented by cross-petitions for *certiorari* is discretionary, see R. L. Stern, *When to Cross-Appeal or Cross-Petition – Certainty or Confusion,* 87 Harv. L. Rev. 763, 777-779 (1974), neither the contention that *Parker v. Brown* applies to the Fairfax Bar nor the argument that minimum fee schedule are not a form of price-fixing, is a certworthy question.

Amendment question although it twice rejected the claim of Fairfax that relief should be prospective only (A 3, 4). In these circumstances, we respectfully suggest that it would be appropriate to have the Court of Appeals consider these questions prior to any ruling on them by this Court. See *Dandridge v. Williams,* 397 U.S. 471, 475 n. 6 (1970).

SUMMARY OF ARGUMENT

In ruling that the minimum fee schedule system established and operated by respondents was outside the scope of the antitrust laws, the Court of Appeals significantly and erroneously narrowed the scope of the Sherman Act. The majority held that there was a "learned profession" exemption for the price fixing activities of attorneys, that petitioners failed as a matter of law to establish that the use of minimum fee schedules to set prices for title examinations to real estate in Northern Virginia had a substantial effect on interstate commerce, and that the actions of respondent Virginia State Bar were "state action", approved by the Virginia legislature and the Virginia Supreme Court, and hence immune under *Parker v. Brown,* 317 U.S. 341 (1943). The cumulative effect of these three rulings is to reverse the entire flow of antitrust decisions in this and the lower Courts and thereby to erect major roadblocks to antitrust enforcement.

In creating an across-the-board exemption for the price fixing activities of members of a "learned profession," the majority below based its decision upon opinions of this Court which it claimed held that such an exemption existed, whereas, as the dissent observed, those opinions contain no more than *dicta* on this question. Although the court below recognized that in *American Medical*

Ass'n v. United States, 317 U.S. 519 (1943), this Court had upheld a conspiracy conviction under the Sherman Act for the activities of doctors and their professional associations, it found a distinction between that case and the instant one which is unsupported either by the language in *AMA* or its facts. Moreover, to the extent that any such distinction exists, this case falls directly under the *AMA* decision, and the Court of Appeals was in error in reaching the contrary conclusion.

Besides its misreading of the relevant cases, the court below in creating an exemption for lawyers failed to take into account the extreme reluctance shown by this Court to read exemptions of any kind into the antitrust laws. It also failed to recognize that where broad exceptions have been created, *i.e.*, those for labor organizations and the insurance industry, they have resulted from Congressional rather than judicial action. Finally, to the extent that the authorities recognize any special treatment under the antitrust laws for the activities of members of a learned profession, the fee setting activities of respondents would not qualify.

On the interstate commerce issue, the Court of Appeals erroneously focused on the fact that the title examination took place entirely within Virginia, whereas this Court has repeatedly held that even wholly local transactions, such as the providing of opinions as to the state of the title to real estate, are within the Sherman Act if they are parts of larger transactions which are interstate in nature. Petitioners established in the District Court that the acquisition and financing of homes in the Northern Virginia area were transactions which had substantial interstate aspects to them, and, accordingly, that the restraints resulting from

the minimum fee schedules for title examination had a substantial effect on interstate commerce.

In making its determination of the commerce issue, the court below also failed to take into account that this Court has held that the Sherman Act is intended to cover all transactions which Congress could have included under its power to regulate commerce. *United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293, 298 (1945). Therefore, a holding here that the requirements of interstate commerce have not been met necessarily determines that Congress could not constitutionally have brought these transactions under the Sherman Act even if it had specifically legislated in this area. Yet this Court's decisions in cases beginning with *Wickard v. Filburn,* 317 U.S. 111 (1942), and continuing through such Civil Rights Act cases as *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), and *Katzenbach v. McClung,* 379 U.S. 294 (1964), have broadly interpreted the power of Congress under the Commerce Clause. Thus, because the opinion of the majority is inconsistent with these decisions, as well as those under the Sherman Act, it must be set aside.

The majority and dissenting judges on the Fourth Circuit panel found that the State Bar was properly dismissed by the District Court under the doctrine of state action set forth in *Parker v. Brown,* 317 U.S. 341 (1943). The majority concluded that the Virginia Supreme Court, acting pursuant to statutory directives from the Virginia legislature, had approved the State Bar's actions regarding minimum fee schedules and thus met the "active supervision" requirement of *Parker.* The dissenting judge chose an alternative ground for the State Bar's exemption – that the State Bar had played only a "minor role" in these matters.

The majority erred in failing to see that this case is factually distinguishable from *Parker* with respect to both of its requirements for obtaining an exemption. First, there is no legislative determination, translated into a detailed statutory directive, that the pricing policies of attorneys are to be regulated by the State, and not left to the free market, unfettered by restrictive arrangements of the kind involved here. The relevant Virginia statutes (Addendum A) do no more than permit the Virginia Supreme Court to regulate the conduct of attorneys and do not contemplate, let alone direct, a specific form of regulating the fee setting practices of members of the Virginia Bar.

Second, and independent of the first requirement, the Court below erroneously concluded that the Virginia Court had approved the actions of the State Bar. It did so by holding that silence on the part of the State Court was the equivalent of approval, a result which relied heavily on an earlier Fourth Circuit decision to the same effect, *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (1971). That ruling is also inconsistent with *Parker* and its progeny, all of which outside the Fourth Circuit have required far more of the State agency than passive acquiescence in private decisions to restrict competition, before granting immunity from the antitrust laws. Since there was no meaningful form of alternate regulation by any agency of the State in this case, the Court was in error in granting a *Parker* exemption to the State Bar.

The lower Court's reading of *Parker* is at odds with this Court's refusal to imply exemptions in the analogous situation of an antitrust defendant seeking immunity based upon the presence of federal regulation in the field covering the alleged violation. This Court has held that immunity

is available "only to the extent necessary" to protect the aims of the regulatory statute. *Silver v. New York Stock Exchange*, 373 U.S. 341, 361 (1963). Given the reluctance of this Court to imply exemptions from the antitrust laws where Congressionally enacted federal regulatory statutes are involved, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) and the cases cited therein, there is no reason to assume that Congress intended to provide the States with greater leeway in overriding the antitrust laws where no substitute form of regulation is involved. Rather than narrowing the *Parker* exemption, the Court below impermissibly broadened it, and hence that portion of its decision must also be reversed.

Similarly, the determination of the dissenting judge – that the State Bar had played only a "minor role" and is thus immune from the antitrust laws – cannot be sustained. That ruling is erroneous because it was stipulated in the District Court that the presence of State Bar Opinions 98 and 170 was a "substantial influencing factor" in the adherence by the Bar to the local fee schedules (Stip. ¶20, App. A, p. 19). In addition, it was also stipulated that the State Bar's 1962 and 1969 Fee Reports were the "basis" of the local fee schedules (Stip. ¶15, App. A, p. 18), and in fact for real estate transactions, the State Bar's recommendations were adopted virtually verbatim by the Northern Virgina bar associations in both 1962 and 1969. On that record, there is no basis for a conclusion that the State Bar was a "minor" participant in these transactions.

ARGUMENT

I. THE PRICE FIXING ACTIVITIES OF RESPONDENTS ARE NOT EXEMPT FROM THE ANTITRUST LAWS MERELY BECAUSE THEIR MEMBERS EARN THEIR LIVINGS IN A "LEARNED PROFESSION".

There is no question that the minimum fee schedule system, with a charge of 1% of the purchase price for a title examination,[18] established and operated by respondents, constitutes price fixing forbidden by the antitrust laws. This is amply demonstrated by this Court's holding in *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950), that a minimum fee schedule arrangement, which lacked the component of sanctions provided here by State Bar Opinions 98 and 170, was a violation of the Sherman Act. In fact, the Court of Appeals found that it was "abundantly clear . . . that the fee schedule and the enforcement mechanism supporting it, act as a substantial restraint upon competition among attorneys practicing in Fairfax County" (App. B, p. 13). Nonetheless, it held that these activities were immune from antitrust liability because they were carried on by members of a "learned profession." In the sections which follow, petitioners will demonstrate that this ruling is in error because it is inconsistent with the broad purpose and scope of the Sherman Act, is not supported by the decisions relied on, and is directly contrary to *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), and other relevant authorities.

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[18] Although the fee schedule charge is reduced to 1/2 of 1% for amounts above $50,000, with further reductions thereafter (Exhibit 29, p. 25, A 40), we will refer to the fee as a 1% charge for convenience.

A. The Reach Of The Sherman Act Is Broad, And Exemptions From It Are Narrowly Construed And Congressional In Origin

This Court recently described the antitrust laws in general and the Sherman Act in particular as ". . . the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates*, 405 U.S. 596, 610 (1972). In reference to the breadth of the coverage of Section 1 of the Sherman Act, this Court has observed: "Language more comprehensive is difficult to conceive." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944). Or, as Mr. Justice Sutherland stated in *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932), Congress, in passing the Sherman Act ". . . meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed." To that end, the terms trade or commerce "have been interpreted broadly . . ." *United States v. Shubert*, 348 U.S. 222, 226 (1955), and the Act has been applied wherever there is ". . . some form of restraint upon commercial competition in the marketing of goods or services." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940). And where price fixing is involved, this Court has specifically brought within the Sherman Act every activity of that kind:

> It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the

> participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or decrease prices. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310 (1956).

Although numerous attempts have been made to create exemptions for classes of persons whose conduct is within the Sherman Act, based upon the special status of the class, this Court has consistently refused to allow an exception absent a specific authorization from Congress. Thus, restraints on the free market imposed by doctors,[19] real estate brokers,[20] and pharmacists[21] have all been held subject to the Sherman Act. In addition, the proscriptions of the Sherman Act have been applied to "intangibles", *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 546 (1944), and theatrical productions, *United States v. Shubert*, 348 U.S. 222 (1955). And when an organization engaged in the collection, assembly, and distribution of news sought a Sherman Act exemption based on the special status of its members under the First Amendment, this Court refused to grant it, noting that the publishers were ". . . engaged in business for profit exactly as are other businessmen who sell food, steel, aluminum, or anything else people need or want." *Associated Press v. United States*, 326 U.S. 1, 7 (1945).

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19 *American Medical Ass'n v. United States*, 317 U.S. 519 (1943).

20 *United States v. National Association of Real Estate Bds.*, 339 U.S. 485 (1950).

21 *United States v. Utah Pharmaceutical Ass'n.*, 201 F. Supp. 29 (D. Utah), *aff'd*, 371 U.S. 24 (1962); *Northern California Pharmaceutical Ass'n. v. United States*, 306 F.2d 379 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962).

What has repeatedly emerged from this Court's decisions is that the broad reach of the Sherman Act will not be undercut by implying exemptions not specifically enacted by Congress. As this Court stated in the *South-Eastern Underwriters* decision, *supra*, 322 U.S. at 561: "Whether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress, not this Court." Such an exception was promptly written into the law after the decision in *South-Eastern Underwriters*,[22] just as an exception for the activities of labor unions was enacted when some years earlier their activities became subject to Sherman Act injunctions. See *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 801-06 (1945). And when the dairy cooperatives were excluded from the reach of the Sherman Act, it was accomplished not by court decision but by statutes. See *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 464 (1960).[23]

The rationale for refusing to imply Sherman Act exemptions is articulated in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), where this Court was asked to relax the application of a *per se* rule in order to promote competition in one industry, while sacrificing it in another. In declining the invitation, this Court noted its "inability to weigh, in any meaningful sense" the competing considerations, *id.* at 609-610, and then stated that "the judgment

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22 McCarran Ferguson Act, 59 Stat. 33, 15 U.S.C. §§ 1011-1015.

23 Even where Congress has enacted specific exemptions, this Court has narrowly construed them. See *Allen Bradley Co. v. Local Union No. 3, supra; Maryland & Virginia Milk Producers Ass'n. v. United States, supra;* and *United States v. McKesson & Robbins, supra.*

of the elected representatives of the people is required" before any such exception should be created. *Id.* at 612. These very considerations should have led the Court of Appeals to conclude that in the absence of a Congressional directive, the price fixing activities of attorneys were within the Sherman Act. However, it reached a contrary conclusion, albeit without commenting on either the breadth of the Sherman Act or the reluctance of this Court to create judicial exemptions from it. Therefore, we shall now examine the authorities relied upon by the appellate court and show that, even standing alone, they do not support an exemption for the "learned professions" from the price fixing activities found here.

B. The Decisions Relied Upon by the Court Below Do Not Support A "Learned Profession" Exemption

The majority of the Fourth Circuit panel stated that there are two decisions of this Court which "hold" that there is an exemption from the antitrust laws for the learned professions (App. B, p. 13). In our view the dissent was entirely correct in its observation that those cases contain no more than *dicta* and do not support any such exemption (App. B, p. 23). Thus, in *Federal Trade Comm. v. Raladam Co.*, 283 U.S. 643 (1931), the question presented was whether the defendant, a seller of patent medicines, had engaged in "unfair methods of competition" under the Federal Trade Commission Act. It was in that context that this Court stated that "[o]f course, medical practitioners. . . are not in competition with respondent. They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but

in prescribing them." *Id.* at 653. Whatever the import of that language may be in other contexts, it certainly does not constitute a holding that learned professions are exempt from the Sherman Act.

The second decision relied upon by the Fourth Circuit is *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). This Court, however, has recently made crystal clear that which was already apparent – that its holding in *Federal Baseball* applies only to baseball:

> With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and anomaly. *Federal Baseball* and *Toolson [v. New York Yankees, Inc.*, 346 U.S. 356 (1953)] have become an aberration confined to baseball.
> *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).[24]

Even the language from *Federal Baseball* relied on by the Court of Appeals – "a firm of lawyers sending out a member to argue a case . . . does not engage in [interstate] commerce because the lawyer . . . goes to another state [259 U.S. at 209]" – was directed primarily at the question of whether the requirement of interstate commerce had been met, and not at the question of whether there was an exemption from the antitrust laws for the activities of professional baseball players or attorneys based on their profession. This is the view of *Federal Baseball* taken by all three judges in *Gardella v. Chandler*, 172

[24] This Court had previously refused to grant an antitrust exemption to boxing, *United States v. International Boxing Club*, 348 U.S. 236 (1955), and football, *Radovich v. National Football League*, 352 U.S. 445 (1957), and recently a circuit court declined to exempt amateur softball, *Amateur Softball Ass'n. v. United States*, 467 F.2d 312 (10th Cir. 1972).

F.2d 402 (2d Cir. 1949). As each of the separate opinions indicates, it was the failure to meet the interstate commerce requirements which had resulted in the antitrust immunity for baseball.[25] *Accord,* Note *The Applicability of the Sherman Act to Legal Practice and Other "Non-commercial" Activities,* 82 Yale L.J. 313, 318-320 (1972) (hereinafter "Note, *'Non-commercial' Activities").*

The majority below also relied on the decision in *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427 (1932), asserting that it "recognized that the practice of a 'learned profession' is not a trade" (App. B, p. 13). In expanding the definition of "trade" in Section 3 of the Sherman Act in *Atlantic Cleaners* to include providers of laundry and dry cleaning services, this Court referred to an opinion of Mr. Justice Story in *The Nymph,* 18 Fed. Cas. 506, 507 (No. 10,388) (C.C. D., Me. 1834), interpreting the Coasting and Fishery Act of 1793 which also utilized the term "trade." In so doing, Justice Story indicated that "trade" would include any occupation carried on for gain " . . . not in the liberal arts or in the learned professions . . .," and it is this language, carried forward into *Atlantic Cleaners,* which was cited by the

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25 Judge Chase concluded that this Court had found that baseball teams "were not engaged in interstate trade or commerce within the scope of the antitrust laws." 172 F.2d at 404. Judge Learned Hand stated that "the Court merely thought [the interstate activities] not important enough to fix the business – at large – with an interstate character." *Id.* at 408. Judge Frank observed that the "concept of commerce has changed enough in the last two decades so that, if that case were before the Supreme Court de novo, it seems very likely that the court would decide the other way." *Id.* at 409, n. 1. In distinguishing the earlier case, Judge Frank said that "the traveling across state lines was but an incidental means of enabling games to be played . . . and therefore insufficient to constitute interstate commerce." *Id.* at 410.

court below to sustain the position that a "learned profession" exemption exists for lawyers under Section 1. In our view, the Court of Appeals of the District of Columbia Circuit was correct in its analysis of the *Atlantic Cleaners* opinion when it stated that the remarks of Justice Story were "purely casual" and not a "proper guide in deciding the important question in this case [of whether restraints by the medical profession were within the Sherman Act.]" *United States v. American Medical Ass'n,* 110 F.2d 703, 709, *reversing,* 28 F. Supp. 752 (D. D.C. 1939), *cert. denied,* 310 U.S. 644 (1940).[26]

In addition, we submit that the Court of Appeals below was clearly erroneous in its interpretation of this Court's decision in *American Medical Association v. United States,* 317 U.S. 517 (1943) (hereinafter "*AMA*"). Because of the significance of that decision to the present case, we shall proceed directly to it and include a discussion of the Fourth Circuit's interpretation within our over-all discussion of that case.[27]

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26 Judge Sharp in *United States v. Oregon State Bar, supra,* also concluded that the "learned profession" language in *Atlantic Cleaners* and *Raladam Co.* was *dicta* (Ad. B, pp. 15, 16).

27 The additional authorities relied upon by the majority below require only brief discussion. *Riggal v. Washington County Medical Society,* 249 F.2d 266, 268 (8th Cir. 1957), simply asserts that the plaintiff's medical practice was not trade or commerce under the Sherman Act. The decision in *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc.,* 432 F.2d 650 (D.C. Cir.), *cert. denied,* 400 U.S. 965 (1970), actually assists petitioners, as noted at pages 41-42, *infra.* The other authority relied on by the appellate court, Mr. Justice Jackson's statement in *United States v. Oregon State Medical Society,* 343 U.S. 326, 336 (1952), that "forms of competition usual in the business world may

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C. This Court's Decision In *American Medical Association v. United States*, Along With Other Authorities, Establishes That There Is No Exemption For The Price Fixing Activities Of Attorneys.

In *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), this Court sustained a Sherman Act conviction against two medical societies and a number of doctors where the purpose and effect of the conspiracy was to destroy the business of Group Health Associates ("GHA"), a provider of medical services on a prepaid basis, utilizing staff physicians. The medical societies in *AMA* had threatened to discipline any doctor who joined the staff of GHA or any doctor who consulted with any such doctor. In addition, any hospital which offered facilities for patients of doctors working for GHA was threatened with boycotts and other reprisals. The result of the conspiracy was to restrain the practice of those doctors who wished to work for GHA, but were afraid to do so, and to limit those who chose to work for GHA by narrowing the availability of doctors who would consult with them and hospitals in which they could place their patients.[28]

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[27] (continued) be demoralizing to the ethical standards of a profession" was *dicta*, issued with a holding that there was no proof of either a boycott or any effect on interstate commerce. That case did not purport to overrule *AMA*, and hence that statement indicates only that in applying the rule of reason, where appropriate, a court should consider the ethical aspects of the profession involved.

[28] The facts in the *AMA* case are set forth in detail in the two lower court opinions, *United States v. American Medical Ass'n*, 28 F. Supp. 752 (D. D.C. 1939), and *United States v. American Medical Ass'n*, 110 F.2d 703 (D.C. Cir. 1940).

While this Court in *AMA* concluded that it was not necessary to decide whether the practice of medicine was a "trade" under the Sherman Act, 317 U.S. at 528, the Court held that the conspiracy which was "aimed at restraining or destroying competition . . . or [restraining] the free availability of medical or hospital services in the market . . ." did constitute a violation of the antitrust laws. *Id.* at 529.[29] The Court held further that the occupations of the defendants were "immaterial if the purpose and effect of their conspiracy was [the] obstruction and restraint of the business of Group Health." *Id.* at 528.

The majority below recognized the viability of *AMA*, but purported to distinguish it (App. B, p. 15). Citing *AMA*, it acknowledged that a conspiracy to obstruct the interstate sale of health insurance would be within the Sherman Act. It then suggested, however, that a conspiracy by a group of doctors to restrain the practice of another member of their profession would not be a Sherman Act violation because the restraint would be on the practice of a learned profession which is neither trade or commerce. Based upon that distinction, the majority concluded that the minimum fee schedule system at issue here was outside the Sherman Act. That distinction is not supported by anything in this

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[29] If this Court should reach the question left open in *AMA*, we fully support the analysis of the Court of Appeals in *United States v. American Medical Ass'n, supra*, 110 F.2d at 707-712, and its conclusion that the common law doctrine of restraint of trade, as incorporated in the Sherman Act, encompasses the restrictions on competition imposed by the doctors and their medical societies in that case and by respondents in this one. *Accord*, Note *"Non-commercial" Activities, supra*, 82 Yale L.J. at 321-324.

Court's ruling in *AMA*, and to the extent that any such distinction exists, this case is within *AMA*. Indeed, this Court in *AMA* specifically noted that, if the conspiracy is intended either to restrain or destroy competition or to restrict the free availability of medical or hospital services in the market, then the Sherman Act would be violated. 317 U.S. at 529.

Like the conspiracy in *AMA*, a conspiracy among lawyers to restrain the practice of other lawyers, by prohibiting them from charging the fees they deem proper, is precisely one of the activities which would restrain the free availability of legal services in the market place. Contrary to the Fourth Circuit's view, such a conspiracy would be squarely within the ruling in *AMA*. While there may be conspiracies among lawyers which arguably do not violate the Sherman Act, the conspiracy here, by restraining the availability of lower cost legal services, clearly violates the Act.[30] The restraint here operates to limit the choice of home buyers in the Northern Virginia-Washington, D.C. area, and to restrict the movement of interstate mortgage money, by eliminating competition in the price to be charged for attorneys fees for a title examination, a necessary part of any financing transaction for homes purchased in Northern Virginia. Just as it was the consumers of medical services who ultimately were deprived of their choice of medical service plans as a result of the defendants' conspiracy in *AMA*, so here it is purchasers of homes in

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30 An agreement among the members of the Bar that a search going back sixty years was an appropriate period for a title examination might be considered to be a "restraint" on the practice of the profession of law, yet not be within the Sherman Act's prohibition because, among other reasons, of the application of the rule of reason in that situation.

Northern Virginia who are ultimately paying the cost imposed by the restrictions on the pricing policies of attorneys resulting from the minimum fee schedule arrangement of respondents. In both instances restrictive practices were established and discipline threatened against the members of the profession who did not adhere. Any doubts that these restraints are within the Sherman Act are dispelled by this Court's holding in *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950). Defendants argued there that their fee schedule did not restrain "trade or commerce" under the Sherman Act for reasons similar to those adopted below, but that position was rejected based on *AMA*, notwithstanding a warning by Mr. Justice Jackson that similar schedules used by doctors and lawyers also would be unlawful. *Id.* at 496. The conspiracy here is substantially the same as those sustained in *AMA* and in the *Real Estate Boards* decision, and, accordingly, the "learned profession" exemption, if it exists at all, is inapplicable here.

In addition, one of the decisions relied on by the majority below, *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970), also supports our position. In that case the defendant, a non-profit educational corporation had refused to accredit Marjorie Webster Junior College because it was a profit making institution. In declining to apply the antitrust laws, the D.C. Circuit adopted a "commercial-non-commercial" distinction which is relevant here:

> "[T]he proscriptions of the Sherman Act were tailored . . . for the business world, not for the *non-commercial aspects* of the liberal arts and

> the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the *commercial aspects* of the profession, is not sufficient to warrant application of the antitrust laws" 432 F.2d at 654 (footnote omitted, emphasis added).

The court concluded by observing that even some requirements of accreditation, if they could be shown to have purely commercial motives, might bring the antitrust laws into play, *id.* at 654-55.[31] See also *Northern California Pharmaceutical Ass'n v. United States, supra,* 306 F.2d at 385, in which the Court stated that where restraints are imposed in the "area of 'entrepreneurial' rather than professional activity," members of a profession are subject to liability for violations of the Sherman Act.

Based upon the *Marjorie Webster* and *Northern California Pharmaceutical Ass'n* decisions, the setting of fees under minimum fee schedules would surely come within the commercial prohibitions of the Sherman Act since, as the District Court noted, " . . . fee setting is the least 'learned' part of the profession" (App. A, p. 5). Whatever doubt there might be concerning the "commercial" aspects of these fee schedules is dissipated by the quotation placed at the beginning of the State Bar's 1962 Fee Report by the Bar's Committee on Economics which prepared the Report: "The lawyers have slowly, but surely, been committing

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31 Thus, it is difficult to comprehend the basis upon which the Court of Appeals stated that the opinion in *Marjorie Webster* supported the proposition that the courts have been "reluctant to superimpose upon the professions the sanctions of the antitrust laws . . ." (App. B, p. 14).

economic suicide as a profession", with the Report suggesting minimum fee schedules as a remedy (Exhibit 26, p. 2, A 20). As Judge Craven noted in his dissent below, the practice of law "is pursued for the purpose (among others) of earning a living. To that extent I think it falls within the strictures of the Sherman Act, and I would affirm the decision below" (App. B, p. 24).[32]

D. Policy Considerations Strongly Support The Inclusion Of Lawyer's Minimum Fee Schedules Under The Sherman Act.

On numerous occasions this Court has emphasized the importance of the effective assistance of counsel, particularly in the context of a criminal case. See *Gideon v. Wainwright,* 372 U.S. 335 (1963). In addition, four recent decisions of this Court have held that the First Amendment protects groups who wish to associate together in order to obtain inexpensive counsel of their choice in the face of challenges by State Bars which sought to place restrictions on those practices.[33] Given the protection which this Court has held to be constitutionally required for those in need

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32 Although it would seem that lawyers would be aware of the rising costs of providing legal services and adjust their rates accordingly, the State Bar apparently felt that it needed to aid practitioners by issuing its 1969 Fee Report with "a general scaling up of fees for legal services . . . because of the escalating cost of operating a law office and the *spiraling increase in the cost of living in recent years* (Exhibit 27, p. 3, A 25, emphasis added).

33 *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1 (1964); and *NAACP v. Button,* 371 U.S. 415 (1963).

of legal assistance, it would be ironic indeed to hold that Congress intended to exempt this important service from the price fixing prohibitions of the Sherman Act.

The effect on consumers and the rest of the business community of permitting lawyers to fix their rates by using minimum fee schedules can be illustrated by focusing on the purchase of a house in Reston, where the Goldfarbs acquired their home. There can be no doubt that the various developers in Reston could not lawfully agree on prices to be charged for homes, nor could the real estate agents establish a uniform fee for their commissions. Similarly, the banks in Northern Virginia, as well as those servicing that area from outside of the State, could not agree to charge a set rate of interest, nor could the title insurance companies all agree to the same rates, unless regulated by a state insurance commission which specifically approved such charges. But under the result condoned by the Fourth Circuit, the attorneys who perform the essential function of title examination on the Goldfarbs' home, without which the transaction could not have been completed, are perfectly free to enter into a price fixing arrangement without fear of Sherman Act liability. We respectfully suggest that nothing in the Sherman Act, its history in the courts or the Congress, or any other reason justifies for exempting lawyers' price setting activities from the prohibition applicable to everyone else involved in the purchase of a home or similar commercial transactions. See Note, *"Non-commercial" Activities,* 82 Yale L.J. at 321-334, and Note, *A Critical Analysis of Bar Association Minimum Fee Schedules,* 85 Harv L. Rev. 971 (1972). But see *Lincoln Rochester Trust Co. v. Freeman,* 34 N.Y. 2d 1, 335 N.Y.S.2d 336, 311 N.E.2d 480 (1974) (construing the New York State antitrust statute in the context of

a request for court awarded fees utilizing a bar association fee schedule).

Finally, to the extent that the opinion of the majority below rests upon an implicit concern that the regulation of the legal profession will be placed entirely under the control of the marketplace, that fear is not justified. Outside the area of *per se* violations, such as price fixing, *i.e.,* in cases involving the application of the rule of reason, the courts may properly consider the professional status of the participants as Mr. Justice Jackson noted in *United States v. Oregon Medical Society,* 343 U.S. 326, 336 (1952). *Accord, United States v. Oregon State Bar, supra* (Ad. B, p. 20).

Furthermore, if the activities of lawyers are properly regulated by the State, they would be exempt under *Parker v. Brown,* 317 U.S. 341 (1943), discussed in Point III, *infra.* The Court of Appeals majority in its concluding paragraph discussing the "learned profession" exemption appears to confuse the "learned profession" exemption with *Parker v. Brown* immunity when it states that "the promulgation of a fee schedule has a sufficient part in the overall scheme devised by the State of Virginia to regulate the legal profession to claim the form of limited immunity to antitrust prosecution available under the 'learned profession' exemption" (App. B, p. 15). The two doctrines are separate, and we respectfully suggest that if attorneys are regulated by the State in a manner entitling them to an exemption under *Parker v. Brown,* then that is the way in which they should be relieved from liability under the Sherman Act. If they do not meet such criteria, then, contrary to the assertion of the majority below, there is no exemption for "learned professions" which would permit them to fix fees as they have done in this case.

II. THE ACTIVITIES OF THE RESPONDENTS HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE

Introduction

There are two approaches under which the Sherman Act's requirement of "commerce among the several States" can be satisified: "it is well established that an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce." *Burke v. Ford*, 389 U.S. 320, 321 (1967) (emphasis in original). Petitioners have never claimed that the activities of respondents occurred *in* interstate commerce, but simply that they have a substantial effect on interstate commerce.

To support their position, petitioners established, and the District Court found as facts, several distinct interstate aspects of the home purchasing and financing markets, which are the two markets affected by the restraints on title examination fees imposed by respondents. First, petitioners demonstrated that the home buying market in Northern Virginia is interstate since in 1970 more than thirty percent of the persons five years of age or older residing in Arlington County, Fairfax County, and the City of Alexandria — the geographic area principally served by the members of the Fairfax Bar — were not Virginia residents in 1965 (Finding 1, App. A, pp. 6-7). In addition, the trial judge also found "uncontradicted evidence" that a "large percentage" of Fairfax County residents work outside Virginia (App. A, p. 4). Second, as to the interstate nature of the home financing industry, a ten percent sampling of the deeds of trust for 1970 and 1971 for Fairfax County indicated that, of more than $136,000,000 in real

estate loans in that sample, more than $75,000,000 was advanced by persons residing outside of, or incorporated outside of the Commonwealth of Virginia (Finding 2, App. A, p. 7). Petitioners also established that the vital guarantee sector of the home loan industry is interstate: in Northern Virginia during 1968-1972 more than $570,000,000 in home loans were guaranteed by the United States Veterans Administration, headquartered in the District of Columbia, or insured by the United States Department of Housing and Urban Development, also headquartered in the District of Columbia (Findings 3 & 4, App. A, p. 7).

Admittedly, almost all of the work connected with examining title to Fairfax County real estate is performed in Virginia. Petitioners contend, nonetheless, that since a title examination is a necessary part of a larger set of transactions which are interstate in character, the restraints at issue here are covered by the Sherman Act. Thus, because the minimum fee schedule system operates to restrict the pricing policies of attorneys who perform title examinations, it has a substantial effect on home buying and home financing which are interstate transactions. None of the factual findings made by the District Court is challenged by respondents, nor were they disputed by the majority in the Court of Appeals.[34] That Court simply held that the facts as found were insufficient as a matter of law to meet the commerce requirement of the Sherman Act. In doing so, it focused excessively, and erroneously, on the local nature of title examinations and failed to see that they affected

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[34] For this reason the case is distinguishable from interstate commerce decisions such as *United States v. Oregon State Medical Society*, 343 U.S. 326, 336 (1952).

interstate transactions and that, therefore, the jurisdictional requirement of the Sherman Act was met.

The first of the two sections which follow discusses the interstate commerce decisions of this and other courts under the Sherman Act and in other analogous areas. We do so recognizing that none of the cases presents an identical factual situation to this one, and with an awareness that "precedent in this area is unlikely to dictate the outcome in any given case. Instead, it is more likely to communicate a general sense as to how much of an impact local activities must have upon interstate commerce before they confer jurisdiction." *Doctors Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, 51 (3rd Cir. 1973).[35] The second portion of this argument is directed to the specifics of this case in light of the relevant authorities and points out the principal reasons that we believe the Court of Appeals was in error.

A. The Reach Of The Sherman Act Is Exceedingly Broad And Covers Wholly Local Activities Which Have A Substantial Effect On Interstate Commerce.

While determinations of commerce questions under the Sherman Act must be resolved on a case-by-case basis, the decisions of this Court do establish a number of propositions which serve as useful guideposts in measuring the opinion of the majority below on the commerce question. Of particular relevance to this case, since the minimum

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35 One of the best discussions of the test to be applied in resolving the commerce question is contained in *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 521-24 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).

fee schedules involved here cover title examinations performed wholly in Virginia, is the ruling of this Court in a decision totally ignored by the majority, *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954): "That wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question." Or, as Mr. Justice Jackson so nicely stated in *United States v. Women's Sportswear Mfgs. Ass'n*, 336 U.S. 460, 464 (1949):

> The source of the restraint may be intrastate as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

See also *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234-237 (1948).

A further guide to the interpretation of the commerce requirement is the oft-quoted remark of Mr. Justice Holmes that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905). When the defendant in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), suggested that the test for interstate commerce purposes was whether the activity in question was essentially local, it was rejected as a "type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power." *Id.* at 546. See also *Rasmussen v. American Dairy Ass'n*,

supra, 472 F.2d at 523 (commerce questions under the Sherman Act should not be decided based on "abstract or mechanistic formulae").

Most importantly, this Court has held that the ambit of the Sherman Act is coextensive with the power of Congress to regulate commerce under the Commerce Clause. "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 [1940]." *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945). Therefore, as the Ninth Circuit recently noted, "every Sherman-Act holding that jurisdiction does not lie is a holding that the evil alleged is beyond the power of Congress to control." *Copp Paving Co. v. Gulf Oil Co.*, 487 F.2d 202, 204 (1973), *cert. granted*, 415 U.S. 988 (1974) (*certiorari* granted only as to commerce questions under the Robinson-Patman and Clayton Acts).* Thus, the decisions expanding the reach of the Commerce Clause have added new dimensions to the coverage of the Sherman Act as well. *Rasmussen v. American Dairy Ass'n, supra*, 472 F.2d at 521. Accordingly, it is appropriate to examine some of the recent rulings of this Court involving other statutes enacted under the Commerce Clause in order to determine the current breadth of the Sherman Act.

Perhaps the most significant case for this proceeding is *Wickard v. Filburn*, 317 U.S. 111 (1942), in which a nationwide marketing allotment for wheat was upheld as it applied to the 11.9 acres of plaintiff's land which he claimed Congress could not regulate under the Commerce Clause. The power of Congress to regulate that particular wheat production was sustained even though it was to be consumed entirely on the grower's own property for

* This Court's December 18, 1974, decision in that case does not affect the validity of the quote or modify other positions taken by petitioners.

such purposes as feeding of poultry and livestock, making bread for the family, and planting seeds for the following year. The basis of that holding was that Congress could properly determine that such added production might have an effect on the overall interstate market for wheat even though the plaintiff's wheat never left his farm. *Id.* at 114.

Recent decisions involving civil rights legislation further demonstrate the breadth of the Commerce Clause. In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), this Court upheld as within the power of Congress to regulate commerce, the prohibition on segregation at local lodgings serving interstate travelers where Congress concluded that such local activities might have the effect of restricting the interstate movement of Black people.[36] In so doing, this Court stated that the determining test under the Commerce Clause ". . . is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest." *Id.* at 255. In the companion case of *Katzenbach v. McClung*, 379 U.S. 294 (1964), this Court sustained the applicability of a federal public accommodations statute to a local restaurant over Commerce Clause objections, where there was no claim that interstate travelers had frequented the restaurant. The basis of the ruling was a finding that ". . . a substantial portion of the food which it serves . . . has moved in commerce."[37] *Id.* at 298.

36 A clear indication that the Sherman Act was intended to reach its constitutional limits is the holding that the Heart of Atlanta Motel was sufficiently engaged in interstate commerce to be subject to the antitrust laws. See *Marriott Hotels of Atlanta, Inc. v. Heart of Atlanta Motel Inc.*, 232 F. Supp. 270 (N.D. Ga. 1964).

37 In fact, the interstate shipment of food was primarily $70,000 of meat purchased over the previous twelve months. *Id.* at 296.

See also *Perez v. United States,* 402 U.S. 146 (1971) (sustaining as a proper exercise of power under the Commerce Clause a federal prohibition on wholly intrastate "loan-sharking" because of a Congressional finding of its tie-ins with interstate criminal activities); *Daniel v. Paul,* 395 U.S. 298, 305 (1969); and *Maryland v. Wirtz,* 392 U.S. 183 (1968).

This Court has ruled in a price fixing case that once an effect on interstate commerce is shown "[i]t makes no difference . . . whether the amount of interstate commerce affected is large or small . . ." *United States v. McKesson & Robbins,* 351 U.S. 305, 310 (1956).[38] In addition, a close analysis of this Court's decision in *Burke v. Ford,* 389 U.S. 320 (1967), reveals that where a *per-se* offense occurs totally intrastate, but is an element in a larger business chain that is interstate, adverse effects on interstate commerce will be presumed. In such cases no specific inquiry as to the effects on interstate commerce is necessary since these restraints "inevitably" affect interstate commerce. *Id.* at 321.[39] As the Ninth Circuit noted in *Rasmussen v. American Dairy Ass'n, supra,* 472 F.2d at 528, ". . . specific consequences may be speculative, but the reality of the economic impact is not." See also *Mandeville*

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[38] The Sherman Act has even been held applicable to sustain a criminal conviction for a price-fixing conspiracy involving a single dishwasher which moved in interstate commerce. *United States v. Bensinger Co.,* 430 F.2d 584 (8th Cir. 1970).

[39] The plaintiffs in *Burke* proved a division of liquor markets by territories and brands involving all Oklahoma wholesalers, all of whose stock came from outside the State. Both lower courts ruled that there was an insufficient effect on interstate commerce shown. This Court granted *certiorari* and simultaneously reversed those rulings.

Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 240 (1948) ("it is inconceivable that the monopoly so created will have no effects for the lessening of competition in the later interstate phases of the overall activity . . .").

These authorities demonstrate, we submit, that the Commerce Clause, and hence the Sherman Act, have been given exceedingly broad interpretations by this Court. They also establish that the determination of whether the commerce requirement has been met necessitates an examination of the entire transaction and that focusing on the location of the restraint will not suffice. It is with these guidelines that we will examine the undisputed findings by the District Court on this issue and analyze the holding of the Court of Appeals that no substantial effect on interstate commerce was shown.

B. Based Upon The Undisputed Facts Found By The District Court, Petitioners Have Established That The Activities Of Respondents Have A Substantial Effect On Interstate Commerce

Petitioners proved, and the District Court found, that two interstate markets were affected by the use of respondents' fee schedules. First, there is the effect on the interstate movement of home buyers. This is evidenced by the fact that thirty percent of the residents in Northern Virginia in 1970, aged 5 years and older, were not residents of the State in 1965. In addition, as the District Court found, and as the dissent in the Court of Appeals quite correctly indicated could be judicially noticed (App. B, p. 22), Fairfax County is one of the bedroom communities for Washington, D.C. In concluding that the housing market in

Northern Virginia "cannot realistically be considered a purely local market," Judge Craven's dissent noted that the "price that thousands of employees in the District of Columbia have to pay for housing in Fairfax County, Virginia, has, it seems to me, a direct, immediate, and substantial effect on interstate commerce." *Id.* In short, the fees for title examination services required in connection with home purchasing inevitably raises the cost of closings and hence restricts the options of home buyers who may work in Washington but wish to live in one of the surrounding communities, including Northern Virginia. Moreover, we submit that under *Burke v. Ford, supra,* once a *per se* violation involving interstate transactions has been proven, the specific effects on interstate commerce need not be demonstrated.

Second is the effect on interstate commerce involved in the interstate loans for home financings in Northern Virginia. Petitioners' witness examined selective deeds of trust on real estate in Fairfax County in what the District Court considered to be a "fair sampling of loans made on [such] real estate" and from which it concluded that "a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia." (App. A, p. 4). The trial court also found that all or nearly all of the lenders require "as a condition of making the loan, that the title to the property involved be examined and that title insurance be furnished and paid for by the home buyer-mortgagor." *Id.* Since under an opinion of the Virginia State Bar,[40] the examining of title and giving an opinion as to the state of it constitutes the practice of law and hence must be performed by lawyers, it is

[40] See note 3, *supra,* p. 4.

clear that virtually every loan made on a home in Northern Virginia requires the services of an attorney. Moreover, as found by the District Court, "there is a significant degree of adherence to the Minimum Fee Schedule (Exhibit 29) in the determination of fees" for title examination services (Finding No. 6, App. A, p. 8). We submit that the District Court was entirely correct in its conclusion that the proportion of out-of-state funds utilized to finance homes in Fairfax County by itself "warrants the conclusion that interstate commerce is sufficiently affected [by the minimum fee schedule system] to sustain jurisdiction under the Sherman Act" (App. A, p. 4).

The District Court also found that "significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia. *Id.* Thus, in 1972 alone, those two agencies guaranteed in excess of $138.5 million in home loans in Northern Virginia (Findings 3 and 4, App. A, p. 8). Accordingly, even when the loan may have been made by a Virginia financial institution to a buyer who works and resides in Virginia, the guarantee may have been an interstate transaction and hence not a purely local one as suggested by the majority of the Court of Appeals.

The dissent contended that under *Burke v. Ford, supra,* (a decision not mentioned by the majority) the requisite effect on interstate commerce had been shown notwithstanding the intrastate nature of the title examination itself (App. B, p. 21). In addition, it quoted from *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., supra,* and from *United States v. Women's Sportswear Mfgs. Ass'n, supra,* to demonstrate the error of the majority in focusing on the

intrastate aspects of the process (App. B, p. 22). After reviewing other authorities and examining the uncontradicted facts found by the District Court, the dissenting judge concluded that the District Court was correct in holding that the requirement of commerce among the several states had been met.

Given the breadth of the interstate commerce shown here – a thirty percent influx into Northern Virginia in a five-year period, more than fifty percent of the homes financed from outside of Virginia, and several hundred million dollars in interstate guarantees issued – it is somewhat difficult to comprehend the basis on which the Court of Appeals concluded that petitioners had not established an effect on "commerce which concerns more states than one and has a real and substantial relation to the national interest"[41] or that these were not transactions "which, reaching across state boundaries, affect the people of more states than one . . ."[42] Given this Court's decisions in *Wickard v. Filburn, Heart of Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung, supra,* there appears to be no basis for the appellate court to have concluded that Congress could not constitutionally proscribe these activities of respondents, a conclusion which necessarily follows in view of this Court's ruling in *United States v. Frankfort*

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41 *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 255 (1964). In 1973 there were more than $66 billion in home mortgage loans made in the United States, U.S. Department of Housing and Urban Development, *Gross Flows,* HUD 74-85, March 19, 1974. As of December 31, 1973, the total amount of outstanding home mortgage loans exceeded $386 billion. Federal Reserve Bulletin, October 1974, A-44.

42 *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 552 (1944).

Distilleries, Inc., 324 U.S. 293, 298 (1945), that in enacting the Sherman Act Congress exercised all of the power that it possessed.[43]

On what basis, then, did the Court of Appeals conclude that the interstate commerce requirement had not been met? One sentence in its opinion, perhaps better than any other, epitomizes the errors into which the majority fell:

> The fact that [lawyer's] services are *occasionally* used by persons who are simultaneously engaged in an *ancillary* interstate transaction to facilitate the conduct of that transaction is merely "incidental"; this does not justify federal regulation of competitive restraints upon a business which is "wholly local" in character. (App. B, p. 18, emphasis added).

Initially, the statement is factually unsupported by the record. The District Court specifically found that all or nearly all lenders require title examinations, and hence there is no basis for the assertion that those services are "occasionally" used by home buyers. Moreover, the reference to an "ancillary interstate transaction" confuses the ancillary with the primary transaction. The primary transaction is the financing of a home, which in more than half the cases

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43 The cases cited by the majority in footnotes 48, 49, and 50 are of dubious validity following *Wickard v. Filburn, Heart of Atlanta Motel, Inc. v. United States,* and *Katzenbach v. McClung, supra,* if they ever were correct. *See Doctors Inc. v. Blue Cross of Greater Philadelphia,* 490 F.2d 48, 51-53 (3rd Cir. 1973). And its attempt to distinguish *Heart of Atlanta Motel* in footnote 50 cannot be accepted in light of this Court's ruling in *Katzenbach v. McClung, supra,* decided with *Heart of Atlanta Motel,* which does not involve alleged restraints on interstate travelers.

involves an out-of-state lender. In order to obtain this financing, the "ancillary" service of a title examination, performed by a Virginia attorney, is obligatory (App. A, p. 4).[44] Therefore, if characterizing in such verbal formulae were any help, we suggest that it is the legal service which is "ancillary" to the basic interstate financing transaction, and not, as the Court of Appeals suggested, the reverse. But as Mr. Justice Jackson warned in *Wickard v. Filburn, supra,* 317 U.S. at 120, these questions should not be decided based on nomenclature, but upon their effects on interstate commerce.[45]

The quoted passage from the majority opinion also demonstrates an unwarranted focus on the location of the services rendered, rather than an overall examination of the effects of the particular restraints to determine their possible relationship to larger transactions which are interstate in nature. As this Court observed in *United States v. Frankfort Distilleries, Inc., supra,* 324 U.S. at 297, and as the majority appears to have overlooked, ". . . there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an *inseparable element* of a larger program dependent for its success upon activity which affects commerce between the

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44 Title insurance, for which a title examination is required, is mandatory only when financing a home. However, even the rare purchasers who pay entirely in cash may elect to have title insurance to protect themselves, in which case the same title examination -- at the same rates - must be obtained.

45 Mr. Justice Jackson's distaste for reliance on catchwords to answer questions under the Commerce Clause, as the Court of Appeals did here, is evidenced by his comment in *Wickard* that "the term 'direct' [as applied to the effects on commerce] was used for the purpose of stating, rather than of reaching a result. . ." *id.* at 122-123.

states" (emphasis added). Similarly neglected by the majority was this Court's statement in *United States v. Employing Plasterers Ass'n,* 347 U.S. 186, 189 (1954), that wholly local business restraints can produce effects condemned by the Sherman Act. See also *United States v. Women's Sportswear Mfgs. Ass'n, supra,* 336 U.S. at 464: "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

In our view the proper analysis is that employed by the Third Circuit in *Doctors Inc. v. Blue Cross, supra,* and the Fifth Circuit in *Battle v. Liberty National Life Ins. Co.,* 493 F.2d 39, 47-48 (1974), in which all of the interstate aspects of the transactions were considered together in determining whether the Commerce Clause requirements of the Sherman Act had been met.[46] However, even considering the interstate elements separately, the Courts of Appeals other than the Fourth Circuit have sustained Sherman Act allegations involving parts of real estate transactions which surely had no greater than, and probably less, connection with significant interstate commerce than was shown here. See *Brett v. First Federal Savings and Loan Ass'n,* 461 F.2d 1155 (5th Cir. 1972); *Bratcher v. Akron Area Board of Realtors,* 381 F.2d 723 (6th Cir. 1967). See also *Gateway Associates, Inc. v. Essex-Costello, Inc.,* 1974-2 Trade Cas. ¶75,231 at 97,538 (N.D. Ill. 1974); *Mazur v. Behrens,* 1974-2 Trade Cas. ¶75,070 at 96,787 (N.D. Ill. 1972), and *United States v. Atlanta Real Estate Board,* 1972 Trade Cas. ¶74,582 (N.D. Ga. 1971).

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46 Judge Craven in dissent found that petitioners had established the requisite effect on interstate commerce based on the "cumulation of these facts" (App. B, p. 22).

In this case there is a truly interstate market among home buyers who may choose among three jurisdictions in which to reside while working in the Washington, D.C. Metropolitan area. For the average home buyer, the addition of a flat fee of 1 percent of the purchase price for a title examination, payable at the closing when the cash burdens are at a peak, is a serious impediment to the acquisition of a home in the Virginia sector of this market. This same impediment applies to obtaining a loan to purchase the home in the home financing market, which is interstate because of the out-of-state origin of the loan and/or its guarantee. In almost every home purchase a title examination, performed by an attorney, is a prerequisite for a loan, with the price for that examination fixed by the minimum fee schedule system established and operated by respondents.

Therefore, petitioners submit that, no matter whether a verbal formula is used, or the facts of this case are analyzed as a whole, the requisite effect on interstate commerce has been proven. Given the interstate aspects of the home acquisition and home financing markets for Northern Virginia, there can be little doubt that Congress could constitutionally have prohibited these price-fixing arrangements had it done so specifically. Accordingly, the Sherman Act is broad enough to cover them, and the requirement of commerce among the several States has been met by petitioners.

III. THE CONDUCT OF THE RESPONDENT VIRGINIA STATE BAR IS NOT IMMUNIZED FROM LIABILITY UNDER THE ANTITRUST LAWS BY THE DOCTRINE OF *PARKER V. BROWN*

In 1962 and again in 1969 the State Bar published Fee Reports which recommended that local bar associations adopt minimum fee schedules (Exhibits 26 and 27, A 19-28). Those Reports also contained suggested schedules for each locality, and those suggestions were generally adopted by the local bar associations with only minor revisions. In addition, the State Bar issued Opinions 98 and 170 stating that any attorney who habitually fails to follow a suggested minimum fee schedule issued by a local bar association is subject to disciplinary action (Exhibits 30 and 31, A 45-48). Throughout these proceedings the State Bar has defended its issuance of these Reports and Opinions primarily on the ground that its activities are immune from the antitrust laws under the "state action" doctrine enunciated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943).

Petitioners contend that *Parker v. Brown* does not grant immunity in the instant case because the State Bar, contrary to its principal contention, is not automatically immune from antitrust liability because it is an agency of the Commonwealth of Virginia for certain limited purposes. Furthermore, we submit that the majority below erroneously concluded that these activities of the State Bar were authorized by the Virginia legislature and actively supervised by the Virginia Supreme Court, both of which must occur before there is immunity under *Parker*. Finally, petitioners contend that, based upon the undisputed facts in the record, most of which were stipulated by the parties, the State Bar's participation in these antitrust violations cannot properly be deemed a "minor" one as the dissenting judge and the trial

court concluded. After discussing the salient features of *Parker v. Brown* in some detail, petitioners will examine each of these rationales for holding the State Bar immune and demonstrate their inapplicability.

A. The Decision In *Parker v. Brown*

In *Parker v. Brown*, the plaintiff sought to challenge a directive of the California Agricultural Prorate Advisory Commission which limited his right to market raisins to an amount below that which he could otherwise sell. The directive was issued pursuant to a broad State-controlled regulatory scheme which had as its statutorily stated purposes to "conserve the agricultural wealth of the State" and to "prevent economic waste in the marketing of agricultural products" by restricting competition. 317 U.S. at 346 quoting Section 3 of the California Agricultural Prorate Act, Chap. 754, Statutes of California of 1933, as amended (the "Prorate Act"). The California legislature, which had concluded that marketing restrictions were necessary to control the production and sale of certain agricultural products, authorized the establishment of marketing programs and included in the requirements for such programs an elaborate procedure under which State officials played a central and decisive role in approving them.

Thus, the statute provided that upon a petition by ten producers, the State-created Agriculture Commission could schedule a hearing to determine whether a marketing program should be instituted.[47] If it found on the basis of

[47] The Commission was composed of nine persons, one of whom was the State's Director of Agriculture. The others were appointed by the Governor, with the consent of the Senate, for a period of (continued)

the facts before it that an agreement would prevent economic waste and conserve the agricultural wealth of the State, without permitting unreasonable profits to producers, the Commission was authorized to grant a petition. 317 U.S. at 346. Thereafter, a Committee, which could include handlers and packers, would be appointed to prepare a detailed program, which was then scrutinized at another public hearing. Next, the Commission had to approve the plan (or approve it with modifications) if it found that it is "reasonably calculated to carry out the objectives of this Act." 317 U.S. at 347, quoting section 15 of the Prorate Act. If Commission approval was given, then the program was voted upon in a referendum of producers, of whom 65%, owning at least 51% of the crop acreage, had to approve before it became effective. Once such a program was approved, it had to be followed by all producers, with failure to adhere punishable as a misdemeanor. In short, once the program was put in effect, competition in a particular agricultural product was eliminated, and all producers were subject to severe marketing restrictions.

In *Parker*, just such a program was approved for California raisins, which comprise almost all of the U.S. raisin consumption and nearly half of the world crop. The drastic selling limitation on producers was assumed to violate the

[47] (continued)
four years. Six of the members were required to be actively engaged in the production of agricultural commodities, but no more than one member could represent any single commodity. Of the remaining positions, one was to be filled by a commercial handler of agricultural products and the other by a consumer representative. See Section 3 of the Prorate Act, as amended, reproduced in Appendix A to the Supplemental Brief of Appellants in this Court in *Parker v. Brown, supra*, No. 46, October Term, 1942.

antitrust laws, unless the program was immune because it was imposed pursuant to a State statute with the approval of State officials. This Court held that the program did not violate the antitrust laws, noting that it "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activity directed by its legislature." 317 U.S. at 350-51. In concluding that Congress never intended to bring within the Sherman Act activities carried out under the direction of a State, this Court emphasized that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . ." 317 U.S. at 351. It further observed that it is the State which has "created the machinery for establishing the prorate program . . . [which must be] approved by the Commission . . . [and by a] referendum by a prescribed number of producers" 317 U.S. at 352. Based upon all these factors, this Court concluded that the implementation of a statutorily directed marketing program was outside the ambit of the Sherman Act.

This Court has not had occasion to apply *Parker* directly in the more than thirty years since the decision. However, in a case involving the role of the Canadian government in conjunction with the activities of certain U.S. defendants, this Court rejected a claim of an exemption based solely on the fact that the Canadian government was involved in the transaction. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). In doing so, it referred to *Parker* as a case of "mandatory" state regulation and

emphasized that there was no evidence in the case before it that the Canadian government "approved or would have approved of joint efforts to monopolize." 370 U.S. at 706. Similarly, in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951), this Court referred to *Parker* as a case involving a situation "when a state *compels* retailers to follow a parallel price policy [and] *demands* private conduct which the Sherman Act forbids" (emphasis added).

Although this Court in *Parker* did not fully spell out the rationale for its holding, the lower courts, with the notable exception of the Fourth Circuit in this case and in its predecessor,[48] have applied *Parker* sparingly in order to harmonize it with the antitrust laws so that the protections afforded by the Sherman Act are not significantly undercut. *See, e.g., Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1367 (10th Cir. 1972). As the First Circuit stated in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 30, *cert. denied*, 400 U.S. 850 (1970):

> Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation.

In our view, the focus on a State's determination to trade the benefits of unfettered competition under the antitrust

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[48] *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (1971). The Fifth Circuit specifically declined to carry *Parker* to the extent that was done in *Washington Gas Light*. See *Gas Light Co. of Columbus v. Georgia Power Co.*, 440 F.2d 1135, 1140 (1971), *cert. denied*, 404 U.S. 1062 (1972).

laws for other forms of protecting the public interest is the keystone of applying *Parker* correctly. Here the lower courts failed to insure that the activities of the State Bar were adequately supervised by the State and that the public was protected as it was in *Parker*, and thus they were in error.

B. The State Bar Is Not Entitled to Immunity On Account Of The Limited Functions It Performs As An Agency Of The State

It is with this analysis of *Parker-Brown* in mind that we shall examine each of the three bases on which it is contended that the activities of the State Bar are immune from antitrust liability. The principal contention of the State Bar itself is that because it is an agency of the Commonwealth of Virginia, its activities are entirely exempt from scrutiny under the antitrust laws (see *e.g., Motion of State Bar to Dismiss*, p. 6). In the first place, the statute relied on by the State Bar, Virginia Code, section 54-49 (Ad. A, p. 1), provides merely that the Virginia Supreme Court may organize the State Bar "to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court . . . ." Thus, to the extent that the State Bar is an administrative agency of the Virginia Court, it is so only for the limited purposes described in section 54-49 and not for all purposes. The absence of a direct connection with the State, as a formal State agency would have, is further evidenced by the fact that pursuant to section 54-52 of the Virginia Code, the funds for the operation of the State Bar are derived entirely from dues paid by lawyers and may be spent solely for purposes of operating the State Bar.

The only authority supporting the absolutist position taken by the State Bar, *State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974), not only is clearly distinguishable on its facts, but much of its language and analysis supports petitioners here. The issue in *American Petrofina* was whether a State was a "person" within sections 1 and 2 of the Sherman Act, and the Ninth Circuit, relying heavily on *Parker*, concluded that under no circumstances could a State itself be held to violate those provisions. Thus, if petitioners had sued the Commonwealth of Virginia, or perhaps even the Virginia Supreme Court, the *American Petrofina* decision might support a refusal of the courts to make a further determination as to whether the actions challenged were legislatively mandated and adequately supervised.[49]

But the suit here is against the State Bar not the State itself, and hence even under *American Petrofina* further analysis is required. The Court there specifically noted that in cases involving a "state created corporation intended to manage a monopoly in the public interest" – almost a

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[49] Even this result is not certain since, as the Ninth Circuit recognized in *American Petrofina*, 501 F.2d at 370-371, the Court of Appeals for the District of Columbia Circuit has held that governmental agencies are not automatically immune under the antitrust laws, *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (1971), *cert. denied*, 404 U.S. 1047 (1972). That Court characterized the absolutist position as a ". . . much too talismanic approach where scrupulous distinctions are called for." *Id.* at 934. In its view the inquiry must be " . . . to what extent is the state action permissible as not contravening the federal antitrust laws, which in our federal system constitute overriding legislation under the federal commerce power." *Id.* at 935. See also *Norman's On the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1017 (3rd Cir. 1971).

precise description of the State Bar – it is essential ". . . to determine whether the anti-competitive result actually is a goal of the state entitled to a state's immunity rather than a private group masquerading under the banner of 'state action.'" 501 F.2d at 369. Unlike *American Petrofina*, where only State officials were involved, the State Bar here is comprised entirely of attorneys who are seeking an antitrust exemption under "the banner of 'state action'" in order to be able to fix the fees charged to the public and thereby enrich themselves. Other than the fact that officials of the State Bar may perform certain tasks on behalf of the Virginia Supreme Court in connection with violations of the Court's ethical rules (section 54-49, Ad. A, p. 1), the differences between this case and *American Petrofina* could hardly be greater.

A similar comparison with the independent State agency in *Parker* also demonstrates the error in the State Bar's position. The California Agricultural Commission in *Parker* included the State's Director of Agriculture, a commercial handler of agricultural products, and a consumer representative; of course, no such comparable representation is provided on the State Bar. Among the six representatives of the farming industry, each of whom had to be nominated by the Governor and confirmed by the Senate, no more than one could be from the segment of the industry that was being regulated by a particular program. Thus, quite apart from the other procedures and statutory requirements that had to be met, the Commission which rendered the key decisions was broadly based and not composed entirely of those in whose own self-interest it was to restrict competition. Moreover, in *Parker* this Court did not rely solely on the Commission's connection with the State, but emphasized numerous other aspects of the

program which were intended to insure fairness to all without sacrificing all of the goals of the antitrust laws. As the First Circuit observed in *George R. Whitten Jr. v. Paddock Pool Builders, supra,* the emphasis in *Parker* on "the extent of the state's involvement precludes the facile conclusion that action by any public official automatically confers exemption." 424 F.2d at 30. Or, as the Fifth Circuit noted in *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1294 (1971), *cert. denied,* 404 U.S. 1047 (1972), state participation "only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter." Accordingly, it is to this further analysis which petitioners now turn.

C. The Actions Of The State Bar Were Not Authorized By The Virginia Legislature And Not Specifically Approved By The Virginia Supreme Court, Both Of Which Are Required To Obtain Immunity Under *Parker v. Brown*

In sustaining the District Court's holding that the Virginia State Bar was exempt, the majority in the Court of Appeals found that participation by the Virginia Supreme Court in the minimum fee schedule arrangement created the antitrust immunity for the State Bar.[50] We do not dispute that in certain circumstances certain actions taken by the Virginia Supreme Court, pursuant to a legislative

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50 As noted previously (*supra,* p. 18), the majority, like the dissent and the trial judge, declined to grant any antitrust immunity to the respondent Fairfax County Bar Association on account of any activities of the Virginia Supreme Court.

directive, might provide antitrust immunity for actions of the State Bar. It is our position, however, that the Virginia Supreme Court has done nothing to constitute the "active supervision" of the minimum fee schedule system, which the Court of Appeals conceded must exist under *Parker* in order to obtain immunity (App. B, pp. 6, 8 & 11). Thus, the questions to be asked are, did the Virginia legislature authorize the State Bar to issue its 1962 and 1969 Fee Reports and Opinions 98 and 170, subject to supervision by the Virginia Supreme Court, and if so, did that Court specifically approve those Reports and Opinions? Unless the State Bar can establish affirmative answers to both of those questions in their entirety, its *Parker* defense must fail.

1. There Was No "Legislative Command" To The Virginia Supreme Court Comparable To That In *Parker*.

In reaching its conclusion that the activities of the State Bar were immune, the majority purported to find the legislative authorization in sections 54-48 and 54-49 of the Virginia Code (App. B, pp. 8-9). Those provisions authorize the Virginia Supreme Court to adopt rules and regulations defining the practice of law, prescribing a code of ethics, prescribing procedures for disciplining, suspending, and disbarring attorneys, and delegating certain of those powers to the State Bar (See Ad. A, p. 1). From this rather general language, the Court determined that the Virginia legislature had "provided for regulation of attorneys through a code of ethics governing professional conduct" (App. B, p. 9). It also stated that the desired goal of the Code of Professional Responsibility, which was adopted under section 54-48, is to benefit clients and the public in general. From these assertions, it concluded that there was a legislative

purpose to protect the public which met the requirements of the legislative directive in *Parker*.[51]

In our view the statutory directives in this case are so fundamentally different from those in *Parker* that the Court of Appeals should have ruled against the claim of immunity on that ground alone. For instance, in *Parker* there was a specific legislative determination to restrict competition by the implementation of the prorate programs in order to conserve agricultural wealth and prevent its waste in California. See *Gas Light Co. of Columbus v. Georgia Power Co., supra,* 440 F.2d at 1135. There is nothing in the general language of the statutes involved in regulating attorneys in Virginia that indicates any kind of concern with restricting competition, let alone a conscious decision to do so in order to achieve other public benefits. In fact, one provision of the Virginia Code – section 54-51, Ad. A, p. 2 – specifically forbids the Supreme Court from issuing ethical rules which are "inconsistent with any statute . . ." The statute in *Parker* also specifically required a finding that the proposed program would prevent waste and conserve the agricultural wealth and, most importantly, that such ends would be achieved without permitting unreasonable profits to be made by the producers. Once again there is

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51 Even if the legislative purpose was to protect the public, the actual purpose of minimum fee schedules is to improve the earnings of the Bar, as evidenced by the Fee Reports themselves (see discussion pp. 8, note 5, and 42-43 *supra*). Moreover, ". . . the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well-intended . . ." *United States v. Topco Associates Inc.,* 405 U.S. 596, 610 (1972).

not the slightest mention of any of these or any similar factors in the Virginia statutes.[52]

Finally, the California Prorate Act required producers to conduct their activities in accordance with the program once it was approved, and the failure to do so was punishable as a misdemeanor. 317 U.S. at 347. It was this mandatory aspect of *Parker* which led to the recent decision in *United States v. Pacific Southwest Airlines,* 358 F. Supp. 1224, 1227 (C.D. Cal), *motion for leave to file writ of certiorari dismissed,* 414 U.S. 801 (1973), in which the Court limited the applicability of *Parker* to legislative action that was *"directed, commanded* or *imposed* (emphasis in original)." See also *Ladue Local Lines, Inc., v. Bi-State Devel. Agency,* 433 F.2d 131 (8th Cir. 1970), where the Court emphasized the legislative mandate in holding the defendant immune under *Parker.* In this case, however, it is apparent that the Virginia legislature has never addressed itself to the question of the desirability of competition among lawyers, let alone has it reached a determination that such competition should not be permitted and that an alternate form of regulation – minimum fee schedules – should be imposed. See *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Comm.,* 263 F.2d 502, 509 (4th Cir. 1959) (*Parker* applies only "[w]hen a state has a public policy against free competition in an industry important to it . . ."). There is simply no basis

52 A specific finding by the North Carolina Supreme Court, pursuant to a statutory directive to it, that the marketing rules and restrictions at issue in *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Comm.,* 263 F.2d 502, 508 (4th Cir. 1959), were "fair and equitable", did not preclude a determination that the rules were unauthorized private actions and not exempt under *Parker.*

for concluding that the regulatory power of "democratically controlled legislatures"[53] has been exercised by the Commonwealth of Virginia in this instance to replace the antitrust laws with an alternate form of protecting the public interest.

2. The Virginia Supreme Court Never "Actively Supervised" The Activities Of The State Bar At Issue Here

But even if the Virginia statutes can be read to constitute a direction or authorization to restrict competition among attorneys by the use of minimum fee schedules, there is no support for the majority's conclusion that there was the "active supervision" by independent State officials that is admittedly required to sustain a *Parker* exemption. Although the Court found that it was "doubtful" that the State Bar could constitute the independent body required by *Parker,* it held that the Virginia Supreme Court was sufficiently independent and related to the State, and that it had actively supervised the State Bar on the matter of minimum fee schedules so that it satisfied *Parker* (App. B, p. 11).

However, the supervision exercised by the State Agricultural Commission in *Parker* had a number of features to it, none of which is present in this case. In *Parker* the processes leading to implementation of a marketing program began only with a petition by ten producers to the Commission, which would determine whether to proceed to the next step which was to hold a public hearing on the proposal. Thereafter, the Commission itself had to make the

53 *Northern California Pharmaceutical Ass'n v. United States, supra,* 306 F.2d at 386.

requisite statutory findings before it could appoint a committee to recommend the specific program to be established. That program thereafter underwent scrutiny in another public hearing, and the Commission again had to make a finding that the program met the statutory mandates. It was only after these procedures were met, and an affirmative vote of producers obtained, that the program could be placed into effect.

To be sure, every *Parker* exemption need not contain each of these procedural safeguards, nor is there any reason to suppose that there is a requirement for any specific form of approval and supervision by the requisite State agency. But there must be more than what took place here, where there is not the slightest evidence to suggest that the Virginia Supreme Court gave any active consideration to the merits of 1962 and 1969 Fee Reports or to the Opinions of the State Bar which provided the mechanism for enforcing adherence to the fee schedules of the local bar associations. The only indications that the Supreme Court was aware of the existence of fee schedules are the statements contained in the ABA's Canons of Professional Ethics and Code of Professional Responsibility, which were adopted almost verbatim by the Virginia Supreme Court (see page 9, *supra*). Thus, Canon 12 of the now repealed Canons of Professional Ethics stated that "in determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee" (App. A, p. 9). In addition, Ethical Consideration 2-18 of the Code of Professional Responsibility, which became effective in Virginia on

January 1, 1971, provides that "[s]uggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees" (App. A, p. 9). It is from these two passing references to minimum fee schedules, rather than any specific approval of the Opinions or Fee Reports by the Supreme Court, that the majority of the Court of Appeals concluded that "[t]he active independent state supervision required in *Parker* is provided here by the Virginia court" (App. B, p. 11).[54]

In reaching that result, the court below relied heavily on its prior opinion in *Washington Gas Light Co. v. Virginia Electric and Power Co.*, 438 F.2d 248 (4th Cir. 1971). There, confronted with a silence on the part of the Virginia Utility Commission similar to the inaction of the Virginia Court in this case, the Fourth Circuit concluded that it was not necessary to equate silence with abandonment of the duty to supervise and that it is "just as sensible to infer that silence means consent, i.e., approval." *Id.* at 252. We respectfully suggest that to permit approval to be manifest by silence would wholly eviscerate the "active supervision" requirement of *Parker*, and is unwarranted both in terms of the facts and language of *Parker*. See *United States v. Oregon State Bar*, *supra*, Ad. B, p. 12; Note, 85 Harv. L. Rev. 670 (1972). The most that can be said for the way in which the Virginia Court supervised the State Bar's role in the

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54 The majority also claimed that the Virginia court has employed minimum fee schedules in setting fees, and offered this as further judicial approval of them. There is no citation to any such action by a Virginia court, and there is nothing in the record to sustain that contention. But even if it were factually correct, it would not constitute the kind of supervision required under *Parker*. See *United States v. Oregon State Bar*, *supra*, Ad. B, p. 9.

fee schedule arrangement is that "the regulatory scheme is one of general supervision rather than one of specific direction" and hence does not confer antitrust immunity. *Marnell v. United Parcel Service of America, Inc.*, 260 F. Supp. 391, 409 (N.D. Cal. 1966).

In fact, in a case in which the defendants claimed antitrust immunity under a federal statute which required the approval of the Secretary of Agriculture, this Court denied the immunity because there was no more than ". . . inaction, or limited action, of the Secretary . . ." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). The approval required in *Borden* is, we submit, the functional equivalent of the "active supervision" requirement in *Parker*, and hence the Court of Appeals was in error in equating silence with authorization.[55] The very general supervision exercised by the Virginia Court over the State Bar does not confer an across-the-board immunity to the Bar

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[55] On October 15, 1974, this Court heard argument in *Jackson v. Metropolitan Edison Co.*, No. 73-5845, in which the petitioners contend that the action of a utility in cutting off service to non-paying customers, without affording them a hearing, is sufficiently the action of the State to come within the Fourteenth Amendment's due process requirements. The lower court ruled that there was no state action because the State utility commission had done nothing other than to accept for filing the regulations which authorized the immediate cut-off, and that hence the action was private and not subject to the Fourteenth Amendment. 483 F.2d 754 (3rd Cir. 1973), *cert. granted*, 415 U.S. 912 (1974). The anomaly of the utility's claim of a "state action" antitrust exemption based on silence while at the same time maintaining the absence of "state action" for due process purposes based on a similar silence, has not gone unnoticed. See *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638, 662 (7th Cir. 1972) (*en banc*), *cert. denied*, 409 U.S. 1114 (1973).

from the antitrust laws since, as this Court observed in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 559, (1944), the fact that States are regulating an industry is itself no reason to suppose that Congress intended to imply an antitrust exemption for that industry. As Chief Justice Stone noted, Congress was well aware that railroads were subject to pervasive federal and state regulation, and yet their activities are clearly subject to the antitrust laws. *Id.* Obviously, Congress realized that lawyers have long been regulated in some respects by the courts of their State, but that should not suppose an intent to exempt them from the antitrust laws for that reason alone.

There can be little doubt that Judge Craven in his dissent was correct when he stated that "I think [the Virginia Supreme Court] will be surprised to learn that it is engaged in *active* supervision of the State Bar's implementation of minimum fee schedules in Virginia. I find nothing in the record to suggest that the Virginia court even knew that Fairfax County Bar Association had a minimum fee schedule, or that it approved it either directly or indirectly through the State Bar." (App. B, p. 21, emphasis in original). Accordingly, the contrary position of the majority cannot be upheld.

D. The Role Of The State Bar In The Operation Of The Minimum Fee Schedule System Was Not "Minor"

There remains only the argument advanced by Judge Craven in his dissent that the State Bar should not be held liable for its "minor role" in these activities (App. B, p. 21). For this proposition, Judge Craven cited that portion of

this Court's decision in *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 494-496 (1950), which sustained a lower court determination that the National Association and its Executive Vice President were not participants in the price fixing conspiracy charged in the complaint. In actuality, this Court simply found that the trial court's factual finding, that those two persons had no responsibility for the alleged price fixing violations, was not clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure. This Court said that it was "left somewhat in doubt as to the extent if any to which the National Association and [its Vice President] were architects of the fee fixing conspiracy or participated in it." *Id.* at 495. Based on what it concluded was "a somewhat attenuated relationship," *id.* at 495, the Court declined to overrule the trial court's determination of nonliability as to those two persons.

If the District Court here had found as a fact that the State Bar had a "minor role" in the establishment and operation of the minimum fee schedule system, then the situation would be comparable to the *Real Estate Board* case, and we could sustain our challenge only by meeting the "clearly erroneous" test rule of Rule 52(a). But that is not the case here for, although the District Court characterized the participation of the State Bar as a "minor role in this matter" (App. A, p. 6), that assertion cannot be read as a factual finding given its context and the failure to include it in the detailed findings of fact that the Court did make. Moreover, even if it had made such a finding, it would be "clearly erroneous." See *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948).[56]

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56 *But compare United States v. Oregon State Medical Society*, 343 U.S. 326, 332 (1952) (appellate court will not set aside finding (continued)

The District Court specifically found that there was a "significant degree of adherence" to the minimum fee schedule for title examination charges (Finding 6, App. A, p. 8) and agreed with the stipulation of the parties that the issuance by the State Bar of Opinions 98 and 170 was a "substantial influencing factor" in the relationship between the fees charged and those listed in the minimum fee schedule (Stip. ¶ 20, App. A, p. 19). There simply would have been no basis for concluding that the State Bar, in threatening to bring disciplinary proceedings against anyone who did not adhere to the fee schedules, played only a "minor role" in this matter.[57] In addition, it is apparent that the issuance of the Fee Reports led directly to the issuance of the local fee schedules (Stip. ¶15, App. A, p. 18). In particular, the "scaling up of fees for legal services" suggested in the 1969 Fee Report (Exhibit 27, p. 3, A 25), was followed almost immediately by increases in the fees contained in the schedules of the local bar associations to make them comparable to those recommended by the State Bar in its Fee Report.[58]

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56 (continued)
in case with "a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses."

57 The majority in the Court of Appeals seemingly agreed with this view of the role of the State Bar since it stated that "the fee schedule and the enforcement mechanism supporting it" act as a substantial restraint on competition (App. B, p. 13).

58 Contrary to the assertion made in note 3 in the State Bar's Motion to Dismiss in the Court, there is relatively little difference between the fee schedule as adopted in Northern Virginia for title examinations (Exhibit 29, p. 25, A 40) from that in the 1969 Report (Exhibit 27, p. 11, A 26). Thus, there is a difference of no more (continued)

The issuance of the Fee Reports, the promulgation of the two Opinions, and evidence such as the letter from one attorney who indicated that he was "ethically required" to follow the fee schedule (Exhibit 9), leave little room for doubt that the State Bar played a significant, not a minor role in obtaining adherence to the minimum fee schedule of the Fairfax Bar Association. There is no *de minimus* role in an antitrust conspiracy, and it is apparent that the State Bar is also responsible for the operation and establishment of the minimum fee schedule system in Northern Virginia, and hence its conduct violated the Sherman Act.

E. The Reluctance With Which This Court Has Implied Exemptions From The Antitrust Laws Where Federal Regulatory Agencies Are Involved Further Demonstrates The Error Of The Court Of Appeals

The view that petitioners have taken of the *Parker* exemption is that it is a narrow one, which is available only where the legislature has decided that other forms of meaningful State regulation should supplant the protection afforded the public by the antitrust laws. Although this

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58 (continued)
than $25 for the minimum charge for any title examination and that difference pertains only to purchases of homes less than $10,000, a rarity indeed today in Northern Virginia. The only other difference is for those homes between $100,000 and $1,000,000, also an insignificant number of transactions. See also Finding 12 of the District Court (App. A, p. 9) where the judge concluded that the 1969 Fee Report and the 1969 Fairfax fee schedule are "essentially identical" for title examination charges.

Court has not had occasion to apply *Parker* in any subsequent cases, it has ruled in a number of recent cases where exemptions were sought from the antitrust laws on account of federal regulatory statutes. In every instance it has stated that such exemptions are to be granted with great reluctance since ". . . the antitrust laws represent a fundamental national economic policy . . ." *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 218 (1966). Although the specific issue in most of those cases was whether the existence of a federal regulatory statute implied a partial or total repeal of the antitrust laws, the inquiry is similar to that in a *Parker* case: did Congress intend to exclude from the antitrust laws the particular activities at issue, in light of the legislative determination that an alternate form of regulation ought to replace or limit competition? Thus, the authors of a recent article discussing the *Parker* defense found that "[t]he judicial approach in the modern state action cases is correspondingly analogous to that which has been more fully developed in the federal regulatory area," E.W. Kintner and D.C. Kaufman, *The State Action Antitrust Immunity Defense*, 23 Am. U.L. Rev. 527, 537 (1974). They therefore concluded that " . . . it would seem appropriate to view state action immunity in the same light as the implied exceptions which may flow from federal regulation." *Id.* at 544.

The test which this Court has established to cover claims of implied exemptions is set forth in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963):

> Repeals of the antitrust laws by implication from a regulatory statute are *strongly disfavored*, and have only been found in cases of *plain repugnancy* between the antitrust and regulatory provisions. 374 U.S. at 350-51 (emphasis added).

That test has been repeatedly applied in all of the recent cases which this Court has decided on that question. See *Otter Tail Power Co. v. United States,* 410 U.S. 366, 372 (1973), and the decisions cited therein.[59] In discussing this issue in *Otter Tail,* this Court issued a warning that the majority below should have, but failed to heed:

> When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. *Id.* at 374.

See also *United States v. Radio Corporation of America,* 358 U.S. 334, 351 (1959). Moreover, in cases like the instant one where a broad claim of exemption was made, this Court has rejected that type of claim, holding instead that an exemption would be available ". . . only if necessary to make the [regulatory] Act work and even then only to the minimum extent necessary" *Silver v. New York Stock Exchange,* 373 U.S. 341, 357 (1963).[60] The reason

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59 While the results in a number of these cases have provoked sharp dissents, the differences have been on the applicability of the relevant statutes to the operative facts, not on the standard to be applied. *See, e.g., Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363 (1973) (finding an exemption), and *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963) (declining to find one).

60 This discerning analysis of the particular provisions of the statute at issue points up the error of the Court of Appeals when it stated that it was "manifestly unfair to dissect a state's regulatory program into its various component parts . . . and then to declare . . . [some parts of] the program . . . outside the *Parker* exemption" (continued)

for this reluctance to grant antitrust immunity is generally that "[t]here is nothing built into the regulatory scheme which performs the antitrust function of insuring that [the defendant] will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Id.* at 358. And in one of the few cases finding that a federal statute pre-empted the antitrust laws, this Court noted that the specific provision relied on ". . . was designed to bolster and strengthen antitrust enforcement." *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 307 (1963). Obviously, no such antitrust considerations are part of Virginia's program of regulating attorneys.

There is also one statutory exemption from the antitrust laws which provides further support for petitioners' view that *Parker* should be applied on a limited basis. That is the McCarran-Ferguson Act which was passed almost immediately after this Court held in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), that the business of insurance was subject to the antitrust laws. That Act, now codified at 15 U.S.C. §§ 1011-1013, was directed both at the problem of assuring that valid State laws were not considered to be pre-empted by Congressional statute and, of particular relevance for this case, at providing an exemption from the antitrust laws for the business of insurance, except "to the extent that such

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60 (continued)
(App. B, p. 10). See also *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 385 n. 14 (1973), where the Court stated that ". . . a statutory scheme that does not create a total exception from antitrust laws . . . may, nonetheless, in particular and discrete instances by implication grant immunity from an antitrust claim."

business is not regulated by state law." 15 U.S.C. §1012 (b). The existence of this provision suggests that Congress, writing less than two years after this Court's decision in *Parker*, concluded that a general regulatory scheme of State control of insurance companies would not be sufficient to exempt them from the antitrust laws under *Parker*, and hence a specific statutory provision to that effect was required. As two commentators have expressed it, " . . . if general state-agency supervision is sufficient to remove the supervised industry from the operation of the antitrust laws, the McCarran-Ferguson Act was a waste of congressional time and energy." E.W. Kintner and D.C. Kaufman, *The State Action Antitrust Immunity Defense*, 23 Am. U.L. Rev. 527, 535 (1974).[61]

This Court warned in *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962), that "[i]mmunity from the antitrust laws is not lightly implied." In fact, in every case finding immunity based upon a federal regulatory scheme, this Court has found either specific approval of the action or a pervasive federal regulatory scheme governing industry competition intended to pre-empt the field.

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61 Moreover, even when Congress has enacted legislation intended to provide an exemption from the antitrust laws, this Court has construed the language narrowly. See *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). Congress responded to *Schwegmann* by amending the exemption statute, but again the exemption was challenged as being insufficiently broad. Finally, this Court in a 6-3 decision in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), concluded that the amendment had been sufficiently broad to sustain the practices being challenged, although in reaching that result it emphasized that even statutory exemptions must be strictly construed. *Id.* at 316. See also *Federal Maritime Comm. v. Seatrain Lines*, 411 U.S. 726, 733 (1973).

Yet it is readily apparent that neither of those conditions was met by the Virginia Supreme Court's role in its regulation of the State Bar's activity relating to minimum fee schedules. Therefore, under the standards applied in federal cases, no exemption would be implied in this particular situation.

Just as this Court has been reluctant to conclude that Congress intended to imply a repeal of the antitrust laws where federal regulatory statutes are involved, we suggest that there should be even greater reason for caution with regard to State programs, since the Court is being asked to rule that Congress would have intended such programs be exempt when it had no control over them. There is simply no basis to conclude that Congress would have wanted to allow the States greater legislative leeway to exempt conduct from the antitrust laws than it was exercising itself under federal regulatory statutes. Thus, in this case respondents are engaged in the practice of a legally protected monopoly, and yet if their conduct is exempt under *Parker*, there is no price protection for the public comparable to the price competition guaranteed by the antitrust laws. Accordingly, this Court should be extremely hesitant to assume that Congress intended to allow the States to override the fundamental national economic policy of the Sherman Act with no standards for doing so, with no assurance of protection of the public, and with no active role being played in the approval of the conduct at issue by truly independent State officials. However broad the reach of *Parker v. Brown* may be, it is apparent that it is nowhere near extensive enough to bring within its ambit the purely private, unsupervised activities of the State Bar which are challenged here.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fourth Circuit should be reversed and the case remanded to it for further proceedings in which it should consider the Eleventh Amendment defense raised by the respondent Virginia State Bar and the claim that relief should be prospective only, advanced by the respondent Fairfax County Bar Association.

Respectfully submitted,

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December 20, 1974

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* The extensive assistance of Tova Indritz, Yale Law School, 1975, is gratefully acknowledged.

ADDENDUM A

Relevant Statutes Relating to the Virginia State Bar Virginia Code 1972 Repl. Vol.

§54-48. *Rules and regulations defining practice of law and prescribing codes of ethics and disciplinary procedure.*– The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

(a) Defining the practice of law.

(b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics.

(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law.

§ 54-49. *Organization and government of Virginia State Bar.*– The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing.

§54-50. *Fees.*– The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations fixing a schedule of fees to be paid by members of the Virginia State Bar for the purpose of administering this article and providing for the collection and disbursement of such fees; but the annual fees to be paid by an attorney at law shall not exceed the sum of thirty-five dollars.

§54-51. *Restrictions as to rules and regulations.*– Notwithstanding the foregoing provisions of this article, the Supreme Court of Appeals shall not adopt or promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys at law, which shall be inconsistent with any statute; . . . .

§54-52. *State Bar Fund; receipts; disbursements.*– The State Bar Fund is continued as a special fund in the State treasury. All fees collected from the members of the Virginia State Bar as provided in § 54-50 shall be paid into the State Treasury immediately upon collection and credited to the State Bar Fund. All moneys so paid into the fund are hereby appropriated to the Virginia State Bar for the purpose of administering the provisions of this article. All disbursements from the fund shall be made by the State Treasurer upon warrants of the Comptroller issued upon vouchers signed by such officer or officers of the Virginia State Bar as may be authorized, by or in accordance with rules and regulations prescribed, adopted and promulgated by the Supreme Court of Appeals, so to do.

None of the funds derived hereunder shall be devoted to publishing decisions of the Supreme Court of Appeals or to law magazines or to buying any such publications nor to the establishment of a clients' security fund.

ADDENDUM B

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[November 22, 1974]

UNITED STATES OF AMERICA, Plaintiff,	)	CIVIL NO. 74-362
v.	)	DECISION AND ORDER
OREGON STATE BAR, Defendant.	)	

The United States brings this civil action to enjoin the Oregon State Bar from further publication, distribution or suggestion of a schedule of attorneys' fees. The complaint is filed and jurisdiction obtained under Section 4 of the Sherman Act, 15 U.S.C. § 4, alleging violation of Section 1 of the Act, 15 U.S.C. § 1. The Government alleges that defendant and various of its members and officers are engaged in an illegal conspiracy to fix prices. Only the Oregon State Bar is made a defendant to this suit.

The defendant moves for summary judgment pursuant to Fed. R. Civ. P. 56, asserting two legal defenses. First, defendant argues that the "state action" doctrine exempts its activities from Sherman Act scrutiny. Second, defendant claims that its activities are immune from antitrust suit by the "learned profession" exemption to the Sherman Act "trade or commerce" requirement.

The applicability of these two special exemptions is the only issue raised by defendant's motion. The Sherman Act validity of the fee schedule itself, viewed without regard to special exemptions, is not before the Court. The parties do not dispute any facts material to this motion.

In 1935 the Oregon legislature passed an act providing that all lawyers in the state must be members of the Oregon State Bar "which hereby is created an agency of the state to carry out the provisions of this Act." Ch. 28, Oregon Laws of 1935. Under the act as amended to date the Oregon State Bar is "a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon." O.R.S. 9.010.

A Board of Governors, elected by the membership, "is charged with the executive functions of the state bar and shall at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice." O.R.S. 9.080. The Board of Governors is empowered, with the approval of the State Bar, to formulate rules of professional conduct; and when such rules are adopted by the Supreme Court, the Board has the power to enforce them. O.R.S. 9.490. Pursuant to this authorization, the Board of Governors formulated a Code of Professional Responsibility which was adopted by the Oregon Supreme Court on December 30, 1970, effective that date.[1] Canon 2 of the Code states:

> "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

Disciplinary Rule 2-106, which accompanies this canon, provides:

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[1] With one exception not here relevant, this Code is identical to the Code of Professional Responsibility adopted by the American Bar Association on August 12, 1969, effective January 1, 1970.

"DR2-106 FEES FOR LEGAL SERVICES.

(A) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) *The fee customarily charged in the locality for similar legal services.*

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." (Emphasis supplied)

The State Bar is charged with the responsibility of investigating complaints as to the conduct of attorneys and filing its recommendations with the Supreme Court. The Supreme Court, after notice and hearing, may affirm, adopt, modify, reverse or reject a recommendation; and may disbar, suspend or reprimand the attorney for breach of the statutory duties or the Code of Professional Responsibility. O.R.S. 9.541 - .580.

On June 1, 1969, the Oregon State Bar published and distributed to its members a "Schedule of Minimum Fees and Charges." This schedule was prepared by the Bar's Committee on Economics of Law Practice. The duties and responsibilities of this committee are not defined by statute nor by bylaws of the Bar.

On April 1, 1973, the Oregon State Bar published and distributed to its members a "Schedule of Suggested Fees and Charges." This schedule was a revision of the 1969 schedule made by various permanent employees of the Bar.

Both the 1969 and 1973 schedules were adopted and approved by the Board of Governors. Neither schedule was adopted or approved by the Oregon Supreme Court nor by the Oregon State Legislature.

I. THE "STATE ACTION" DOCTRINE

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal . . . ."

While "[i]mmunity from the antitrust laws is not lightly implied," *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962), an exemption from antitrust law coverage for the activities of a state was carved out by the Supreme Court thirty-one years ago. *Parker v. Brown*, 317 U.S. 341 (1943). The defendant in the instant case argues that this state action doctrine exempts its activities from Sherman Act attack.

The dimensions of this state action exemption have never been clear. Much of the language in *Parker v. Brown, supra*, generates confusion rather than clarification. Thus, while the Court exempts "state action or official action directed by the state," it declares that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351.

The line between immunity and illegality can be made less uncertain by an examination of the facts in *Parker*. In that case, a producer and packer of raisins challenged the raisin proration marketing program established pursuant to the California Agricultural Prorate Act. The program severely restricted the free marketing of raisins. Several factors figured significantly in the Court's analysis. First, the California Agricultural Prorate Act specifically authorized the establishment of proration marketing programs which would restrain competition and maintain prices. Second, although private producers were involved in the petition for, formulation of, and administration of the program, the

program was not effective until approved by a state commission following at least two public hearings. This commission was composed of the state Director of Agriculture and eight gubernatorial appointees. Third, the Court found that the California scheme dovetailed with the federal Agricultural Adjustment Act, which authorized the Secretary of Agriculture to impose similar marketing restrictions and which recognized the existence of state programs.

Thus, the Court stated, 317 U.S. at 350-51:

> "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

The most recent discussion of *Parker v. Brown* is found in *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974), where the court concluded that if a state itself is the defendant in an antitrust suit, no further analysis is required before dismissing the claim pursuant to the state action doctrine. However, when the state is not the

named defendant, the court must engage in a comprehensive examination of the legislative will. The court stated, at pp. 369-70:

> "But these cases [in which the state itself is not the defendant] involved suits against allegedly private defendants who defended on the basis that the state has authorized their anti-competitive conduct. The alleged authorization is normally either a putative regulatory scheme or a state created corporation intended to manage a monopoly in the public interest.
>
> "In either situation, it is necessary to determine whether the anti-competitive result actually is a goal of the state entitled to the state's immunity rather than a private group masquerading under the banner of 'state action.' Such a determination necessarily involves an inquiry into legislative motives, and courts are understandably reluctant to apply the state's immunity to private parties without a clear indication by the state's legislature that the anti-competitive results have its sanction.
>
> "But there is no indication from those cases that the legislature must declare its intent to supplant competition in an industry when there is no question that the conduct is committed by the state. Since the suit here is directly against the state, there can be no such question, and the *Whitten* analysis is inapplicable. The 'legislative mandate' test is useful, indeed possibly necessary, when there is doubt if the defendant or the regulatory scheme is really an instrument of the state. But when there is

no doubt that the defendant is the state, the 'legislative mandate' analysis is unncessary.

"This conclusion comports with the reliance in *Parker* upon a 'legislative mandate.' After declaring that the Sherman Act is inapplicable to states, the Court seemingly turned to the question whether the plan was really the act of the state, noting that 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' From what follows in the Court's opinion, it appears that the Court was responding to the obvious point that since the Commission was comprised of industry leaders and the plan was formulated by industry representatives, the plan was nothing more than a private agreement diguised as state action. It was apparently to this obvious objection that the Court responded when it relied upon the legislative regulatory policy and the fact that the commissioners were gubernatorial appointees. Thus, the Court was merely relying on the legislative mandate to conclude that the plan was the product of the state; it did not conclude that state action is immune from antitrust liability only when directed by the legislature as part of an anticompetitive regulatory scheme." (footnotes omitted)

In the instant case, the defendant is not the state of Oregon, but is a public corporation and an instrumentality of the Judicial Department. Since the defendant is comprised

of private attorneys, and since the fee schedule is formulated by private attorneys, the *Parker* "legislative mandate" test must be applied to determine whether the fee schedule promulgated is the action of the state.

There is no Oregon statute specifically authorizing the promulgation of an attorneys' fee schedule; nor, of course, is there a federal statute explicitly recognizing or implicitly authorizing the formulation of such fee schedules. In addition, the fee schedules published and distributed by the defendant were neither debated in public hearings nor approved by a disinterested state commission. In short, there is not the substantial state direction and involvement required to meet the legislative mandate requirements and to elevate these Oregon State Bar activities to the plateau of "state action" immunity.

Defendant argues vigorously that invalidation of fee schedules would threaten the ethical structure of the legal profession, noting the prohibition on "clearly excessive" fees in DR2-106, Code of Professional Responsibility. It also cites several cases which refer to fee schedules in the determination of reasonable fees, with apparent approval.[2] However, neither the Code of Professional Responsibility nor the cited case law amounts to a "legislative command" that the defendant formulate a fee schedule.[3] The prohibition on "clearly excessive" fees can certainly be enforced

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[2] *See, e.g., Junker v. Junker,* 188 Neb. 555, 198 N.W.2d 189 (1972); *State ex rel. Baker v. County Court,* 29 Wis.2d 1, 138 N.W.2d 162 (1965); *Cox v. State Ind. Accident Comm.,* 168 Or. 508, 123 P.2d 800 (1942).

[3] At oral argument the Government conceded the validity of DR2-106 itself, which has been adopted and approved by the Oregon Supreme

(continued)

without the existence of an official fee schedule, one which does not encompass all types of legal work anyway. A suggested fee schedule has never set a ceiling on attorneys' fees; on the contrary, it has tended to establish a comfortable floor below which such fees need not fall. And the court use of suggested fee schedules is not sufficient to stamp them with the imprimatur of the state legislature.

Other cases have addressed this problem. In *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission,* 263 F.2d 502 (4th Cir. 1959), another leading case on the state action doctrine, the Fourth Circuit held that the state action doctrine did not exempt local tobacco boards of trade from the antitrust laws. These boards of trade, authorized by state statute to regulate tobacco auctions, were not supervised in any manner by state officials. The regulations, then, were essentially formulated by private businessmen to govern their own conduct, much as the fee schedules at issue here were formulated by private attorneys for their own use. The value of *Asheville* as authority against the defendant is questionable, though, since the Fourth Circuit distinguished the case in *Goldfarb v. Virginia State Bar,* 497 F.2d 1 (4th Cir. 1974), *cert. granted,* 43 U.S.L.W. 3246 (U.S. Oct. 29, 1974) (No. 74-70).

In *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F.2d 25 (1st Cir. 1970), *cert. denied,* 400 U.S. 850 (1970), the First Circuit held that the *Parker* exemption does not apply to the action of a public agency

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[3] (continued) Court pursuant to a specific Oregon statute. Neither in briefs nor at argument did either party mention EC2-18, which refers to suggested fee schedules. Apparently, the parties recognize that the Ethical Considerations, unlike the Disciplinary Rules, are not mandatory in character.

in approving specifications for competitive bids. Although the factual context of *Whitten* is significantly different from the case at bar, the following language, 424 F.2d at 30, has been quoted with apparent approval by the Ninth Circuit in *Petrofina, supra,* at 368-69:

> "The [Parker] Court's emphasis on the extent of the state's involvement precludes the facile conclusion that action by any public official automatically confers exemption. As one commentator has observed, the assertion that an act is 'valid governmental action * * * suggests inquiry rather than ends it. * * * Generally, the underlying issue in determining the applicability of such an exemption is the degree of governmental involvement in, and supervision over, the allegedly wrongful private activity.' Comment, Alabama Power Company v. Alabama Electric Cooperative, Inc., 55 Va. L. Rev. 325, 345-346 (1969). Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation."

In concluding that the Oregon State Bar activities in question here are not exempt "state action," I have considered carefully the recent Fourth Circuit decision dealing with the validity of attorneys' fee schedules, *Goldfarb v. Virginia State Bar, supra.* That case is a class action brought on behalf of homeowners against the Virginia State Bar and the Fairfax County Bar Association. The court held that the State Bar is exempt from antitrust liability because of

the *Parker* state action doctrine. I am not persuaded by the reasoning of the court.

The *Goldfarb* court read *Parker* as establishing three requirements for exemption of an activity as state action: (1) it must benefit the public; (2) it must be actively supervised by independent state officials; and (3) it must have received its authority and efficacy from legislative command.

First, the court found that the primary benefits of the Code of Professional Responsibility accrue to the public, and that the fee schedule, as part of the same general regulatory scheme, should not be invalidated simply because it also benefits individual attorneys. In my opinion, this reasoning is unsound. Not only is the fee schedule not a part of the Code, but it is not even necessary for the regulation of the bar for public benefit. The fee schedule should be examined apart from the general regulatory scheme; such an examination would disclose little public benefit. *See* Note, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption That Doesn't Exist,* 3 U.C.L.A. – Alaska L. Rev. 207, 236-43 (1974); Note, *A Critical Analysis of Bar Association Minimum Fee Schedules,* 85 Harv. L. Rev. 971 (1972); Note, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust,* 1968 Wis. L. Rev. 1237, 1253-58.

Second, the court held that the Virginia state court's inaction with regard to specifically approving or disapproving fee schedules should be construed as active supervision by independent state officials since the court has the authority to regulate the bar. I do not think that such consent by silence meets the *Parker* test. Additionally, the parties thereto stipulated that the Virginia court gave authority

to the State Bar to issue suggested fee schedules. No such authority has been given by the Oregon Supreme Court.

Third, in *Goldfarb* the parties also stipulated that the regulation program received its authority and efficacy from legislative command. No such stipulation exists in the instant case. And even so, reliance on the stipulation in *Goldfarb* begged the question, for the issue was whether the promulgation of fee schedules was authorized by the legislature, not whether the general regulation of attorneys was so authorized.

In sum, the *Goldfarb* case, on which the defendant relies heavily, is unpersuasive; since it is not binding precedent, this court chooses not to follow it.[4]

II. THE "LEARNED PROFESSION" EXEMPTION

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits conspiracies in restraint of "trade or commerce." The

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[4] One final argument by plaintiff should be mentioned. Plaintiff argues that, even if the Oregon legislature has mandated some limitations on competition among attorneys, the defendant must show that its actions constitute the least restrictive alternate available to achieve the desired end. In support of this proposition, plaintiff cites *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963), a case which reconciled the Securities Exchange Act with the antitrust laws. The Court held that the powers of self-regulation granted the Exchange did not give it unbridled immunity from the antitrust laws, but only that immunity required to enable the Exchange to achieve the aims of the Securities Exchange Act.

Silver does not involve the state action doctrine. Whether the *Silver* analysis regarding reconciliation of two federal statutory schemes should apply to the instant case is an issue this court does not reach since I conclude that the Oregon legislature has not directed the defendant to limit fee competition.

defendant argues that its activities do not constitute "trade or commerce" because it is engaged in a "learned profession." The existence *vel non* of a "learned profession" exemption to the Sherman Act has not been determined conclusively by the Supreme Court; an analysis of this question must of necessity depend on the implications of several Supreme Court cases which approach without reaching this issue.

Limitations on the scope of the term "trade" originated with *The [Schooner] Nymph*, 18 F. Cas. 506, 507 (No. 10,388) (C.C.D. Me. 1834), in which Justice Story, concluding that fishing was a trade within the Coasting and Fishery Act of 1793, stated:

> "The argument for the claimant insists, that 'trade' is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion, that such is not the true sense of the word, as used in the 32d. section. In the first place, the word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. *Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade.* Thus, we constantly speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith, and a shoe-maker, though some of these may be, and sometimes are, carried on without buying or selling goods . . . ." (Emphasis added)

The reference to "learned professions" is dictum since the case holds that fishing is within the scope of the term "trade."

In *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 436 (1932), the Supreme Court quoted the above passage with apparent approval in construing the scope of the "trade or commerce" clause in Section 3 of the Sherman Act, 15 U.S.C. §3. But there also the "learned profession" language is dictum since the Court held that a conspiracy to fix prices for cleaning, dyeing and renovating clothes was covered by the Sherman Act.

The Supreme Court again reproduced the Story quotation in *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 490-91 (1950), another Sherman Act Section 3 case. Once again the "learned profession" reference is dictum since the Court held that a conspiracy to fix real estate commissions was prohibited by the Sherman Act. The Court stated, 339 U.S. at 491-92:

> "The fixing of prices and other unreasonable restraints have been consistently condemned in case of services as well as goods . . . . Chief Justice Groner made an extended analysis and summary of the problem in United States v. American Medical Ass'n, 72 App. D.C. 12, 16-20, 110 F.2d 730, 707-711, where the Court of Appeals for the District of Columbia held that the practice of medicine in the District was a 'trade' within the meaning of §3 of the Act. Its conclusion was that the term included 'all occupations in which men are engaged for a livelihood.' *We do not intimate an opinion on the correctness of the application of the*

> *term to the professions.* We have said enough to indicate we would be contracting the scope of the concept of 'trade,' as used in the phrase 'restraint of trade,' in a precedent-breaking manner if we carved out an exemption for real estate brokers . . . ." (Emphasis added)

Significantly, the *Real Estate Boards* opinion does not cite *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 653 (1931) (dictum), where the Court stated that medical practitioners "follow a profession and not a trade." This *Raladam* dictum, then, presumably has little current import. Nor did the Court in *American Medical Association v. United States*, 317 U.S. 519, 528 (1943), refer to *Raladam.* Instead, the Court stated that it need not reach the question whether a physician's practice constitutes "trade" under Section 3 of the Sherman Act. Evidently, then, the Supreme Court does not feel that it has already carved out any "learned profession" exemption.

On the other hand, the Supreme Court does recognize that some competitive practices prevalent in the business world may not be acceptable for the profession. Thus, in *United States v. Oregon State Medical Society*, 343 U.S. 326, 336 (1952) (dictum), the Court stated:

> "We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession. *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608."

The cited *Semler* case dealt with state regulation of advertising by dentists, not with fee schedules. Even should fee schedules be invalidated under the Sherman Act, ethical considerations could still be sufficient to sustain prohibitions on solicitation and advertising.

The only other Supreme Court statements in this area are found in the series of sports cases beginning with *Federal Baseball Club v. National League*, 259 U.S. 200, 209 (1922), where the Court, in holding baseball exempt from the Sherman Act, stated that "personal effort, not related to production, is not a subject of commerce." This much criticized decision has never been extended to other professional sports, having been characterized by the Supreme Court itself as "an aberration." *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). *See also Haywood v. National Basketball Association*, 401 U.S. 1204 (1971); *Radovich v. National Football League*, 352 U.S. 445 (1957); *United States v. International Boxing Club*, 348 U.S. 236 (1955).

Supreme Court cases thus leave open the question whether there is a "learned profession" exemption to the Sherman Act. It is instructive to examine decisions of other courts regarding this issue.

The only circuit court case dealing with the status of the legal profession itself under the Sherman Act is the above-discussed *Goldfarb* opinion. The district court in *Goldfarb* had declined to declare the existence of any "learned profession" exemption, stating, "Certainly fee setting is the least 'learned' part of the profession." *Goldfarb v. Virginia State Bar*, 355 F. Supp. 491, 495 (E.D. Va. 1973).

The Fourth Circuit, however, reversed this part of the district court decision, stating, 497 F.2d at 13:

> "Throughout the development of federal antitrust law there has been judicial recognition of a limited exclusion of 'learned professions' from the scope of the antitrust laws. This exclusion is not a favor bestowed upon professionals by the courts as a 'professional courtesy'; the exclusion arises from the language of the statutes and the peculiar nature of the services rendered."

The court bases its decision on two Supreme Court cases, *Federal Trade Commission v. Raladam Co., supra,* and *Federal Baseball Club v. National League, supra.* As we have already seen, the "learned profession" dicta in these two cases have no current vitality; *Goldfarb,* then, actually forges a new exemption to the Sherman Act.

The *Goldfarb* decision was based in large part on policy considerations. The court noted that the usual competitive forces do not operate in the realm of attorney-client relations. The court stated, 497 F.2d at 14:

> "The legal profession has rejected the maxim of *caveat emptor* as a standard of conduct. Unlike the mechanic or the butcher, a lawyer has a professional duty to provide his services at a reduced rate to those who need but cannot afford his services. Advertising and other forms of solicitation of business common to trade and commerce are criminal acts when utilized by lawyers. In view of the special form of regulation already imposed upon those in the legal profession the courts have been reluctant to superimpose upon the profession the sanctions of antitrust laws, many of which are in direct contravention of existing legal and ethical restrictions." (footnotes omitted)

In addition, the defendant in the instant case cites several cases which stress the confidential and fiduciary relationship between attorney and client, and the duty of the profession to make legal services available even to those who cannot afford them.[5] It argues that, in light of the high standards and duties of the legal profession, the ordinary price competition for business has no place. The New York Court of Appeals accepted these arguments in its construction of the New York state antitrust statute, holding that judicial control over the profession, rather than antitrust law enforcement, was intended by the legislature. *Lincoln Rochester Trust Co. v. Freeman,* 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 (1974).

Defendant's policy arguments, of course, deserve serious consideration. There are indeed many factors which might convince a lawmaking body that the legal profession should not be subjected to all the rigor of the Sherman Act. However, the creation of exemptions to the Sherman Act is the province of Congress, not the courts. *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944); *see also United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). It is not for this court to create a new exemption to the Sherman Act for so-called "learned professions."

---

5 *See, e.g., United States v. Dillon,* 346 F.2d 633 (9th Cir. 1965), *cert. denied,* 382 U.S. 978 (1966); *Barton v. State Bar of California,* 209 Cal. 677, 289 P. 818 (1930); *Sands v. Purcell,* 11 Or. App. 614, 504 P.2d 768 (1972).

Furthermore, the argument for exempting price-fixing activities of a "learned profession" is significantly weaker than the argument for exemption of other professional activities. Price-fixing is a *per se* violation of the Sherman Act. *United States v. Socony-Vacuum Oil Co., supra.* Most restraints of competition are subject to the "Rule of Reason," which calls for balancing the various harms and benefits occasioned to the public by the conduct in question. Thus, even though fee schedules are not immune from Sherman Act scrutiny, the professional bans on solicitation and advertising may still survive – if the public benefit from these ethical canons outweighs the competitive harm.

Several cases have indicated that a viable line might be drawn between the "commercial" and "noncommercial" activities of a profession, exempting only the latter from the Sherman Act. *See, e.g., Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970); *Northern California Pharmaceutical Association v. United States*, 306 F.2d 379 (9th Cir. 1962), *cert. denied*, 371 U.S. 862 (1962).

In *Northern California Pharmaceutical Association, supra,* the Ninth Circuit considered and rejected defendants' argument that the "learned professional" status of pharmacists exempted their drug price-fixing agreement from the Sherman Act. The court stated, 306 F.2d at 385:

> "In short, it is in an area of 'entrepreneurial,' rather than professional activity, that appellants are charged with having run afoul of the Sherman Act.

And at 386 the court stated:

> "We do not decide that every action of professionals is within the reach of the Sherman Act. We do decide that an agreement among professionals to fix a commodity price is."

In *Marjorie Webster Junior College, supra,* the D.C. Circuit held that defendant's school accreditation activities were immune to antitrust law attack. The court stated, 432 F.2d at 654:

> "[T]he proscriptions of the Sherman Act were 'tailored * * * for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions." (footnotes omitted)

This adoption of a "commercial/noncommercial" activity dividing line is perhaps just an application of the "Rule of Reason." Be that as it may, there is no more commercial element to the practice of law than the setting of fees. Thus, even the acceptance by this Court of the exemption of noncommercial professional activities from the Sherman Act would not save defendant's fee schedules.

It is the conclusion of this Court that the fee schedule activities of the defendant, Oregon State Bar, are not immune to Sherman Act attack by either the "state action" doctrine or by the "learned profession" exemption. Accordingly, defendant's motion for summary judgment is DENIED.

DATED at Seattle, Washington, this 22d day of November, 1974.

/s/ Morell E. Sharp

UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
FILED
JAN 31 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF RESTON, VIRGINIA HOMEOWNERS,

Petitioners,

v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT FAIRFAX COUNTY BAR ASSOCIATION

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In The

Supreme Court of the United States

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF
RESTON, VIRGINIA HOMEOWNERS,
Petitioners,

V.

VIRGINIA STATE BAR AND
FAIRFAX COUNTY BAR ASSOCIATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT FAIRFAX COUNTY BAR ASSOCIATION

I.

QUESTIONS PRESENTED

1. Whether legal fees for purely local real estate title examinations substantially affected trade or commerce among the several states as required by the Sherman Act.

2. Whether the Sherman Act, which is limited in its application to "trade or commerce," should now be judicially extended to the learned professions.

3. Whether an advisory fee schedule promulgated pursuant to a scheme of valid state regulation, embodied in legislation, judicial canon, State Bar regulation and ethical opinions, is immune from challenge under the Sherman Act.

4. Whether the mere suggestion of minimum fees, undertaken for legitimate purposes, constitutes price fixing.

5. Whether the per se rule is appropriate where, as here, the activity in question is an integral part of state regulation and the question presented is both novel and far-reaching in its implications.

6. Whether any rule of fee schedule illegality, which would be wholly without precedent in this context and potentially destructive of the legal profession, should be applied prospectively only.

II.

STATEMENT OF THE CASE

A.

Proceedings Below

Lewis H. and Ruth S. Goldfarb (the Goldfarbs) brought this class action in the United States District Court for the Eastern District of Virginia, against the Fairfax County Bar Association (Fairfax)[1] and the Virginia State Bar (State Bar), charging that the promulgation of an advisory minimum fee schedule, as it applied to legal fees for real estate work, constituted a violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The suit sought treble damages and injunctive

[1] Initially, two other northern Virginia bar associations were named as defendants. The Complaint initially sought treble damages in the amount of $1,200,000.

relief pursuant to §§ 4 and 16 of the Clayton Antitrust Act. 15 U.S.C. §§ 15, 26. Fairfax denied that it had violated the federal antitrust laws. The damage issue was severed, and the issue of liability was tried by the court without a jury. The district court held that Fairfax's promulgation of an advisory fee schedule constituted price fixing in per se violation of § 1 of the Sherman Act.[2]

On February 2, 1973, a judgment was entered enjoining the use by Fairfax of the advisory minimum fee schedule. Fairfax appealed from that judgment to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals held that the Sherman Act was inapplicable. First, it found that the advisory minimum fee schedule did not have a sufficient effect upon interstate trade or commerce. Further, the Court held that restraints upon competition among lawyers are immune from antitrust challenge because a learned profession is not "trade or commerce." Petitioners then sought a writ of certiorari from this Court.

B.

The Parties

The Goldfarbs, in the course of their 1971 purchase of a home in Reston, Virginia, made use of the services of a Fairfax County attorney. The Goldfarbs purport to represent a class of plaintiffs consisting of all home buyers in Reston between February 22, 1968, and February 22, 1972.

Initially, the Goldfarbs sought to bring the suit on behalf of all home owners in northern Virginia and two civic organizations purporting to represent those who could not ob-

[2] The trial court on the other hand held that the role of the state agencies in the matter was state action exempt from antitrust challenge. Accordingly, it dismissed the action as to the State Bar, leaving Fairfax the only defendant in the case.

tain homes in northern Virginia because of the high fees prescribed by bar associations' minimum fee schedules. Subsequently, however, the Goldfarbs voluntarily abandoned the two organizations seeking to recover for potential home owners. The district court then further specifically limited the class to home owners in Reston, Virginia.

Fairfax is a voluntary association of attorneys practicing in Fairfax County, Virginia.

The State Bar is an agency of the Commonwealth of Virginia, created by the Virginia Supreme Court pursuant to § 54-49 of the Code of Virginia, whose membership consists of all attorneys licensed to practice law in Virginia.

C.

The Purchase

This case concerns a transaction that occurred entirely within Virginia. In 1971 the Goldfarbs, who then resided in Arlington, Virginia, signed a contract to purchase a home in Reston, Virginia. Findings of Fact No. 24, Ad. 5-6.[a] At the time of the purchase, the builder who had constructed the Reston home and the real estate agent through whom the home was purchased both maintained their offices in Reston, Virginia. Findings of Fact No. 25, Ad. 6. The purchase was financed by a deposit with a Virginia contractor of $2,000, a down payment of $37,500, and a $15,000 loan from a lending institution, also in Virginia, secured by a first deed of trust on the property. Stip. No. 3, Ad. 16.

The Goldfarbs retained A. Burke Hertz, an attorney licensed to practice law in Virginia, to handle the legal

[a] In this Brief, references to the Addendum hereto will be identified as "Ad. ....." References to the Single Appendix will be identified as "A. ."

aspects of the transaction, including the examination and certification of the state of title to the property. Stip. No. 4, Ad. 16. Mr. Hertz performed all of the legal services required without leaving the Commonwealth of Virginia. Findings of Fact Nos. 28, 29, Ad. 6. The closing on the purchase of the Goldfarbs' home occurred at Mr. Hertz's Falls Church, Virginia, office. Findings of Fact No. 29, Ad. 6.

The Goldfarbs paid Mr. Hertz a fee for examination of title that happened to be equal to the fee recommended by the advisory fee schedule published by Fairfax and other local bar associations, and also to the fee specified in the Minimum Fee Schedule Report promulgated by the State Bar, an official agency of the Commonwealth of Virginia.

D.

State Regulation and the Advisory Fee Schedule

The advisory fee schedules published by the local bar associations and the State Bar's Minimum Fee Schedule Reports are essential components of Virginia's policy of ethical regulation of the legal profession. Pursuant to the statutory authority of § 54-48 of the Code of Virginia empowering the Supreme Court of Virginia to prescribe a code of ethics governing the professional conduct of lawyers and to establish disciplinary procedures, that court has adopted and promulgated the Canons of Ethics and the Code of Professional Responsibility of the Virginia State Bar. Findings of Fact Nos. 6, 9 & 13, Ad. 1-5. The canons and the Code are the foundations for the advisory fee schedules. Findings of Fact No. 6, Ad. 1.

As we demonstrate more fully below (Argument V, Section C) in connection with the immunity of state-approved action from challenge under the antitrust laws, the State Bar

has erected a regulatory system to support the particular ethical provisions of the Canons and Code relating to advisory fee schedules. The advisory opinions issued by the State Bar, binding on all attorneys practicing in the State of Virginia, affirmed the propriety of advisory fee schedules. Findings of Fact Nos. 6, 9, 10, Ad. 1. As manifested by the repeated issuance of the State Bar Minimum Fee Schedule Reports and by the issuance of advisory opinions, the Commonwealth has placed its stamp of approval on the use of advisory fee schedules for the legitimate purpose of complying with the state-adopted Canons of Ethics and the Code of Professional Responsibility. Findings of Fact Nos. 11, 12, Ad. 2; Stip. No. 19, Ad. 18.

Fairfax, in reliance upon the authority of the State Bar and together with the bar associations of Arlington and Loudoun Counties and the City of Alexandria, adopted its most recent advisory fee schedule on June 12, 1969. Stip. No. 15, Ad. 17. Fairfax took this action after the predecessors of the very fee schedule challenged in this suit had been submitted to the Antitrust Division of the Department of Justice on two separate occasions, in 1961 and again in 1965. Each time the official response stated that the Antitrust Division did not consider such schedules to be violations of the Sherman Act. (A. 49, 54). The 1969 schedule was never circulated to the Association members, but was retained at the Fairfax County Courthouse for the use of any lawyers who expressly requested it.

Fairfax, by resolution on September 16, 1974, rescinded the fee schedule and stated its intention not to reinstitute any such schedule.

III.

PRELIMINARY STATEMENT

In its Brief in Opposition, Fairfax argued that its rescission of its advisory fee schedule mooted this case. Because any judgment by this Court that Fairfax violated the Sherman Act by promulgating a schedule of suggested fees should be applied prospectively only, and because Fairfax has rescinded its advisory fee schedule and stated its intention not to renew it, Petitioners are no longer in need of substantial relief from this Court. A decision on the merits by this Court would not affect the important rights of any party. Under applicable Supreme Court standards this case is therefore not appropriate for Supreme Court review.[4]

This Court, in granting the Petition for Certiorari, apparently disagreed with Fairfax's contentions as to mootness. Nevertheless, without reiterating those arguments here, Fairfax again urges this Court to withhold its hand in this case, since the operative facts no longer exist, the fundamental and substantial rights of the parties can no longer be affected, and great unfairness will result from a retroactive holding that the Sherman Act has been violated.

One other matter raised in Petitioners' Brief (Pet. Br. 24) deserves preliminary comment. The Petition for Certiorari addressed itself only to the interstate commerce requirement of the Sherman Act, the exclusion of the learned professions from the scope of the Sherman Act's terms "trade or commerce," and the state action doctrine as it applies to conduct of the Virginia State Bar. Petitioners con-

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[4] *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974): " '[F]ederal courts are without power to decide questions that cannot affect the rights of the litigants before them.' " 416 U.S. at 316 [quoting *North Carolina* v. *Rice*, 404 U.S. 244 (1971)].

tend that Fairfax's failure to cross-petition for certiorari precludes this Court's consideration of any other issues. A long and compelling list of this Court's authorities to the contrary, however, establishes that Fairfax is entitled to review of all alternative grounds urged in support of the judgment below.

It is well settled by decisions of this Court that, when an initial petition for certiorari has been filed, the respondent need not cross-petition for certiorari to be entitled to review of any grounds urged in support of the lower court's decree. *See, e.g., United States* v. *Carignan,* 342 U.S. 36, 38 n.1 (1951); *Stelos Co.* v. *Hosiery Motor-Mend Corp.,* 295 U.S. 237, 238-39 (1935); *Langnes* v. *Green,* 282 U.S. 531, 535-38 (1931); *cf. Swarb* v. *Lennox,* 405 U.S. 191, 202 (1972) (White, J., concurring); *Dandridge* v. *Williams,* 397 U.S. 471, 475 n.6 (1970).

In *Langnes* this Court noted that a respondent's objections to the lower court's decree are reviewable only as a matter of discretion in the absence of a cross-petition for certiorari. Where, however, as here, the respondent seeks only to urge alternative grounds that would *sustain* the lower court's judgment, even when those grounds were rejected by the lower court, it is entitled to Supreme Court review of those grounds as a matter of right. In *Langnes* this Court said:

> "Respondent here defends that decree upon the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. His right to do so is beyond successful challenge . . . ." *Id.* at 538.

Petitioners rely upon *Strunk* v. *United States,* 412 U.S. 434 (1973), and *NLRB* v. *International Van Lines,* 409 U.S. 48 (1972). In each of these cases, however, the arguments urged by the respondent, if successful, would have dictated an expansion of the judgment of the court of appeals rather than mere affirmance. Accordingly, neither case is apposite in this context.

This Court's established practice, as reflected in *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970) and *NLRB* v. *Express Publishing Co.,* 312 U.S. 426 (1941), is to the effect that a cross-petition for certiorari is necessary when the respondent seeks to *enlarge* its rights or *reduce* the petitioner's rights fixed by the lower court's judgment. When, however, the respondent merely seeks to urge an alternative ground for affirming the judgment below, it is clear that no cross-petition for certiorari is necessary.[5]

In the instant case none of the arguments made in this Brief would in any sense attack the judgment of the Fourth Circuit or enlarge Fairfax's rights under that judgment. Under the *Langnes* doctrine and this Court's consistent practice, and in the interest of justice, this Court should therefore consider each of the arguments advanced by Fairfax in this Brief.

IV.

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that it did not have jurisdiction under the Sherman Act to decide this case.

First, the record is utterly devoid of the required evidence that the Fairfax advisory fee for title examination had any effect whatsoever upon interstate commerce. Petitioners merely proved that Fairfax promulgated an advisory

[5] *See* Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?,* 87 Harv. L. Rev. 763, 769-77 (1974).

fee schedule and adduced evidence of totally disconnected and causally unrelated interstate financial transactions. Their bald assertion that the advisory fee necessarily had an effect upon these interstate transactions is without semblance of factual support. Indeed, the record shows that all transactions connected with the conduct complained of by Petitioners occurred wholly within the Commonwealth of Virginia and that an attorney's examination of title to real estate is a purely local activity. A finding of federal jurisdiction in these circumstances would strip the Sherman Act phrase "trade or commerce among the several States" of any real meaning and thereby destroy the fundamental constitutional delineation between the state and federal domains.

Second, the Court of Appeals decided that the Sherman Act applies only to "trade or commerce," terms that have never included the learned professions. Opinions of this Court for over fifty years have indicated that lawyers practice a learned profession upon which Congress did not intend to impose antitrust regulation. Mechanical application of antitrust principles to the practice of law would in any event destroy the beneficial ethical regulation undertaken by states in the public interest. For this reason, this Court should not at this late date judicially expand the Sherman Act beyond the limits intended by Congress.

Moreover, this case does not involve wholly private activity. The Commonwealth of Virginia, acting through the Virginia Supreme Court and the Virginia State Bar, a legislatively established agency of the Commonwealth, has imposed a scheme of regulation of lawyers' activity of which local fee schedules are an integral part. Fairfax's promulgation of its advisory fee schedule was undertaken pursuant to this regulatory plan. Hence, Fairfax and its members are now caught between antitrust sanctions urged by Petitioners,

on the one hand, and state regulation on the other. In such circumstances, the well-established doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943), dictates that antitrust enforcement should yield to the state regulation.

Should this Court decide to apply the antitrust laws with full force to the activities of Fairfax, however, it will find that the facts reveal no antitrust violation. Fairfax promulgated its advisory fee schedule, not to fix fees, but merely to serve the legitimate ends of state regulation. The schedule is merely advisory, and Fairfax never had the authority, nor did it take any action, to enforce the schedule. This Court has long held that such legitimate exchanges of price information do not constitute price fixing in violation of the Sherman Act.

In this area of novel antitrust application, evaluation of the advisory fee schedule should not in any event proceed under the per se rule of illegality. Analysis of the schedule should take into account its purpose and effect, the extent to which it is used and enforced, and the ample justification that it assists members of the bar association in fulfilling their obligations imposed by state regulation. In the absence of the doctrine of *Parker* v. *Brown,* the rule of reason is needed to provide a workable interface between antitrust enforcement and state regulation.

Finally, minimum fee schedules have been in use for decades. They have frequently been relied upon as a guide by courts called upon to establish an appropriate fee for legal services rendered. If fee schedules are now to be outlawed, after all of these years in which it was assumed they were justified, and indeed often were state-approved, the new rule of law should operate only prospectively.

In the case of fee schedules in northern Virginia, officials of the Antitrust Division of the Department of Justice ex-

pressly disclaimed the notion that these fee schedules violated the antitrust laws. No governmental prosecution, until very recently, was ever filed challenging a recommended fee schedule. To subject lawyers to treble damage antitrust liability, potentially aggregating vast sums of money, would be ironic and unfair in light of this backround.

Fundamental injustice would result from a retroactive decision at the expense of lawyers all across the country who assumed only that they were striving to maintain their profession's highest ethical standards. Fairfax's recission of its fee schedule makes retroactive application of any rule of antitrust unlawfulness not only grossly unfair but now also manifestly unnecessary.

V.

ARGUMENT

A.

The Fairfax Advisory Fees For Examination Of Titles To Real Estate Did Not Restrain Trade "Among The Several States."

The Court of Appeals correctly held that Fairfax's promulgation of an advisory fee for title examination did not have a substantial effect upon interstate commerce. Petitioners failed to show that the advisory fee had any effect whatsoever upon any interstate trade and thus failed to meet this essential jurisdictional prerequisite of the Sherman Act. Any interstate commerce effect present in this case was merely incidental and entirely remote from the local conduct at issue.

Two traditional tests are used to determine whether conduct restrains trade "among the several states." The acts complained of must either (1) occur within the flow of interstate commerce, *Las Vegas Merchant Plumbers Ass'n* v. *United States,* 210 F.2d 732, 739 n.3 (9th Cir.), *cert. denied,* 348 U.S. 817 (1954), or (2) substantially affect interstate commerce, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 234 (1948). Petitioners concede that the activities of Fairfax did not occur within the flow of interstate commerce. Therefore, this Court must decide only whether the advisory fee for title examination substantially affected interstate commerce.

1. Petitioners Have Not Shown That The Advisory Fee For Title Examination, A Purely Local Activity, Had Any Effect Upon Interstate Commerce.

In *Mandeville Island Farms* this Court spelled out the "substantial effect" test:

> "[G]iven a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence." 334 U.S. at 234.

Whether the alleged restraint caused a substantial adverse effect on interstate commerce must be determined on examination of the record. *Gulf Oil Corp.* v. *Copp Paving Co.,* ..... U.S. ....., 43 U.S.L.W. 4059, 4062 n. 12 (December 17, 1974).

Petitioners did not meet their burden of proof to establish a substantial adverse effect upon interstate commerce. Indeed, the record is devoid of any evidence that would support an inference that Fairfax's promulgation of an advisory fee for title examination had *any* effect whatsoever upon interstate commerce.

Petitioners were residing in Virginia when they contracted to purchase a home in Reston, Virginia. All transactions relating to the purchase of their home, including the

negotiation for sale, contract of sale, title examination, securing the mortgage loan, settlement and all legal services occurred within the Commonwealth of Virginia.

Petitioners rest their case on a melange of irrelevant fact and speculation totally disconnected from the Fairfax advisory fee for title examination: (1) some Fairfax County residents work outside Virginia, (2) some residents of Arlington County, Fairfax County and the City of Alexandria were not Virginia residents in 1965, (3) some out-of-state mortgage money is used to finance some real estate purchases in Virginia, and (4) federal agencies in Washington, D.C. guarantee some real estate loans in Fairfax County.

As the Court of Appeals recognized, these contentions are irrelevant. Admittedly, for instance, a large percentage of Fairfax County residents work outside Virginia. But how can a title examination fee suggested by a bar association advisory fee schedule have any effect whatsoever upon commuting to and from work?

It is specious to contend that the Fairfax fee schedule affected interstate commerce because some home buyers in northern Virginia are former residents of other states. No such effect was demonstrated, and none can logically be imagined. Obviously, some persons have crossed state lines in moving for the first time to Virginia, but common sense alone demonstrates they are not in interstate commerce in the same sense as the travelers in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), upon which Petitioners so heavily rely.

More importantly, the facts established at trial simply do not show that the suggested fee for title examination had any effect whatsoever on any home buyer's decision whether to buy a home in northern Virginia. It is an elementary non sequitur to conclude that the advisory fee had any effect on home buying and home financing merely because title

examination by a lawyer was a necessary part of those transactions. Petitioners did not show at trial that the title examination fees in Fairfax were higher or lower than they would have been in the absence of the fee schedule. Moreover, even assuming that the schedule resulted in higher fees for title examination, it is sheer speculation to conclude that this fact in itself deterred prospective home owners from purchasing a home in Virginia. The decision to buy a home in a particular state, again as a matter of common sense, does not turn upon the fee charged for examination of title. Indeed, the Fairfax advisory fee did not deter the Goldfarbs or any of the members of the plaintiff class from buying in Virginia.[6] Thus there is no basis in fact or logic, and certainly not in the evidence at trial, for a finding that the advisory fee for title examination affected interstate commerce.

Doctors, Inc. v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3d Cir. 1973), cited by Petitioners, is readily distinguishable. In that case the court refused to dismiss the complaint for lack of subject matter jurisdiction because it alleged that the challenged conduct would eliminate competitors and thereby affect "a significant amount of traffic in out-of-state goods." *Id.* at 53. Thus, assuming the truth of those allegations, the court found that it was "quite likely that the flow of supplies allegedly affected . . . [would], in fact, decline if overall activity in the market decline[d]." *Id.* By contrast, in the instant case there was no allegation

[6] Petitioners assert that the fee schedule restrained interstate commerce in the sense that it deterred *prospective* home buyers. There is no such evidence in the record. Furthermore, no such buyers are members of the plaintiff class. In *St. Anthony-Minneapolis, Inc.* v. *Red Owl Stores, Inc.*, 316 F.Supp. 1045 (D. Minn. 1970), the court noted that it did not need to decide whether a prospective buyer might have standing to challenge a restraint on interstate commerce affecting its activities, since no such prospective buyer was a party to the case.

or proof that the effect of the minimum fee schedule was to eliminate any competitors. More importantly, the record below furnishes no basis whatever for concluding that the advisory fee for title examination had any significant effect upon interstate commerce.

Nor do the various commerce clause cases cited by Petitioners mandate a finding of Sherman Act jurisdiction in this case. In *Wickard* v. *Filburn*, 317 U.S. 111 (1942), this Court upheld provisions of the Agricultural Adjustment Act of 1938 that established wheat quotas for individual farmers. A farmer could be penalized for growing wheat in excess of his quota, even if the wheat was to be consumed on the farm. On the basis of a finding that the consumption of home-grown wheat affected interstate commerce because it caused substantial variations, when viewed in the aggregate, in the nationwide demand for wheat, this Court concluded there that the conduct regulated had a substantial effect upon interstate commerce. In contrast, there is no basis in the record for such a finding in the case at bar.

Similarly, both *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), and *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), are distinguishable from the instant case. In *Heart of Atlanta Motel* racial discrimination in the renting of motel rooms made it very difficult for Negroes to obtain traveling accommodations. Thus the interstate movement of Negroes was clearly restricted. In *McClung*, excluding Negroes from a restaurant clearly affected the consumption of food moving in interstate commerce. Moreover, both *Heart of Atlanta* and *McClung* involved statutes based on congressional findings that certain prohibited activities affected interstate commerce, and this Court's role was to verify the reasonableness of the legislative presumption. In contrast, the instant case depends not

on statutory presumption but on the state of the record developed at trial. Petitioners have not shown that the Fairfax fee schedule resulted in an increased fee for title examination. Even assuming such a result. Petitioners did not show that the allegedly higher fee affected commerce to any degree, much less to a substantial degree.

Petitioners also contend that, since a per se antitrust offense has been alleged in this case, a substantial effect upon interstate commerce should automatically be presumed. *Burke* v. *Ford*, 389 U.S. 320 (1967), is cited as authority for this sweeping contention. In *Burke* this Court held that a division of territories among local liquor dealers, whose liquor was sent from out-of-state, violated the Sherman Act. Obviously, the very subject of the restraint, liquor, was involved in interstate commerce. In the case at bar, however, the lawyer's service of title examination is the essence of the challenged activity, and it is clearly intrastate. In any event, *Burke* does not stand for the proposition that a per se antitrust offense ipso facto has a substantially adverse effect upon interstate commerce. The Court never even mentioned per se illegality. At most, the decision holds that territorial divisions involving out-of-state liquor "inevitably affected interstate commerce." *Id.* at 322. In the instant case, however, it cannot be said that a higher fee necessarily results from the advisory fee schedule—quite the reverse may be the actual result. Nor can it be said that any higher title examination fee that might result from the schedule has the inevitable effect of deciding prospective home buyers against purchasing homes in the Virginia sector. Realistically viewed, home buyers simply do not make locational decisions on the basis of title examination fees.

This Court's recent decision in *Gulf Oil Corp* v. *Copp Paving Co.*, ... U.S. ...., 43 U.S.L.W. 4059 (Dec. 17, 1974), a case involving per se offenses, among others, confirms (Dec. 17, 1974), a case involving per se offenses, confirms that Sherman Act jurisdiction cannot be presumed on the basis of the per se nature of the challenged conduct. This Court held that "a court cannot presume [substantial effects upon interstate commerce]." *Id.* at 98,323. In addition, lower court decisions, many of which were decided after *Burke*, make clear that where intrastate rather than interstate activity is the subject of the alleged per se restraint, courts must always answer the threshold jurisdictional question—whether the restraint is in commerce or substantially affects interstate commerce—by an examination of the record. Only when interstate commerce is the subject of the restraint may a court then presume a substantial *amount* of such commerce because of the per se nature of the offense. *See Yellow Cab Co.* v. *Cab Employers, Automotive & Warehousemen, Local 881*, 457 F.2d 1032 (9th Cir. 1972); *United States* v. *Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970); *Page* v. *Work*, 290 F.2d 323, 331 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961); *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F.2d 732, 747 (9th Cir. 1954).

Surely, a holding that any per se offense, no matter how local in actual effect, automatically confers jurisdiction under the Sherman Act would make a nullity of the commerce clause of the Constitution.

2. Examination Of Title To Real Estate Is A Purely Local Activity And Is Thus Not Likely To Have A Substantial Effect Upon Interstate Commerce.

Because a finding that "an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it," *Wickard* v. *Filburn*, 317 U.S. 111,

124 (1942), courts have often examined carefully whether challenged activity was "essentially local." *See, e.g., United States* v. *Yellow Cab Co.*, 332 U.S. 218, 231 (1947); *Lawson* v. *Woodmere, Inc.*, 217 F.2d 148 (4th Cir. 1954); *Diversified Brokerage Services, Inc.* v. *Neil Adamson Co.*, 1974-2 Trade Cas. ¶ 75,362 (S.D. Iowa 1974).

As the Court of Appeals pointed out in this case, the local nature of the challenged conduct is a factor that should be considered, for "[a]n activity which is part of a 'general local service' is less likely to be subject to the Sherman Act than is an activity which constitutes an 'integral part' of interstate commerce." 497 F.2d at 18 [citing *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 233 (1947)].

This Court gave expression to the "essentially local" formulation in *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 231 (1947). There, this Court held that the Sherman Act did not reach monopolization of the taxicab business in a city. According to this Court, such a taxicab business was essentially local in nature and neither involved nor affected interstate commerce even though the taxicabs often carried interstate train passengers from one point to another within the city. Similarly, a title examination does not lose its local character because a home owner comes from out of state or borrows money that crossed state lines.

Lower courts, too, have often found that "essentially local" conduct did not substantially affect interstate commerce. For instance, in *Savon Gas Stations* v. *Shell Oil Co.*, 309 F.2d 306 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963), the Fourth Circuit held that a restrictive covenant contained in a gasoline service station lease did not violate the Sherman Act. The decision was grounded on the fact that the sale of petroleum products at a service station is

local and intrastate in character and that the enforcement of the restrictive covenant did not reach beyond the State of Maryland.[7] *Id.* at 309-10.

Courts have used the "essentially local" formulation in a variety of contexts. Thus, a contractors' association and a labor union, *Albrecht* v. *Kinsella*, 119 F.2d 1003 (7th Cir. 1941), ice and cold storage facilities, *Atlantic Co.* v. *Citizens Ice & Cold Storage*, 178 F.2d 453 (5th Cir. 1949), *cert. denied*, 339 U.S. 953 (1950), barbering, *Hotel Phillips, Inc.* v. *Journeymen Barbers*, 195 F.Supp. 664 (W.D. Mo. 1961), *aff'd*, 301 F.2d 443 (8th Cir. 1962), and property management, *Marston* v. *Ann Arbor Property Managers Ass'n*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970), have all been held to be "essentially local" in nature and thus beyond the scope of the federal antitrust laws.

Especially pertinent here are those cases holding various aspects of the practice of medicine to be "essentially local" in nature. For example, the court in *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959), dismissed a complaint alleging a conspiracy on the part of a local medical society to interfere with and restrict the referral of patients to the plaintiff hospital. According to the court, the operation of a hospital was purely local in nature and did not constitute commerce for purposes of stating a claim under the Sherman Act. Nor was the hospital's purely local nature altered in any way by the fact that some of the hospital's patients might have traveled in interstate commerce. *Accord, Spears Free Clinic & Hospital* v. *Cleere*, 197 F.2d 125 (10th Cir. 1952).

[7] This point is particularly relevant to the case at bar since Fairfax's advisory fee schedule pertained only to lawyers practicing within the Commonwealth of Virginia.

Similarly, in *Riggall* v. *Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U. S. 954 (1958), a physician brought an action against a county medical society and its members alleging wrongful refusal of the society to admit him as a member. The antitrust allegations were dismissed on the ground that the practice of medicine was purely local in nature and did not involve or affect interstate commerce. The fact that the physician treated patients from other states did not convert the practice of medicine to interstate commerce. *Accord, Nankin Hospital* v. *Michigan Hospital Service*, 361 F.Supp. 1199 (E.D. Mich. 1973); *see also Robinson* v. *Lull*, 145 F.Supp. 134 (N.D. Ill. 1956); *Polhemus* v. *American Medical Ass'n*, 145 F.2d 357 (10th Cir. 1944).

The record below established that, like the practice of medicine, examination of titles to real estate in Virginia is essentially local in nature. Indeed, it is a *purely* local activity. In searching a title, a Virginia attorney does not cross state lines. Findings of Fact No. 29, Ad. 6. To the contrary, the activity involves only Virginia real estate and Virginia deed book records. Thus a restraint directed at such wholly local activity could never have substantially affected interstate commerce.

3. Any Incidental And Remote Interstate Commerce Effect Present In The Instant Case Does Not Serve To Bring The Local Fee Schedule Applicable To Title Examination Within The Jurisdiction Of The Sherman Act.

Implicit in the "substantial effect" test is a requirement that the challenged restraint actually cause a substantial effect upon interstate commerce, rather than be merely incidental to interstate commerce. Thus, it is often said that jurisdiction under the Sherman Act will exist only if

the challenged conduct has a "direct and substantial, and not merely inconsequential, remote of fortuitous" effect on interstate commerce. *Page* v. *Work,* 290 F.2d 323, 333-34 (9th Cir.), *cert. denied,* 368 U.S. 875 (1961); *see, e.g., Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219 (1948); *Rosemound Sand & Gravel Co.* v. *Lambert Sand & Gravel Co.,* 469 F.2d 416, 418 (5th Cir. 1972); *United States* v. *Bensinger Co.,* 430 F.2d 584, 588 (8th Cir. 1970); *Diversified Brokerage Services, Inc.* v. *Neil Adamson Co.,* 1974-2 Trade Cas. ¶ 75,362 (S.D. Iowa 1974).

A variation of the above formulation holds that "[t]he incidental flow of supplies in interstate commerce does not in itself transform an essentially intrastate activity into an interstate enterprise." *St. Anthony-Minneapolis, Inc.* v. *Red Owl Stores, Inc.,* 316 F.Supp. 1045, 1048 (D. Minn. 1970). For example, in *Hospital Building Co.* v. *Trustees of Rex Hospital,* 1974 Trade Cas. ¶ 74,903 (4th Cir. 1974), *aff'g* 1973 Trade Cas. ¶ 74,428 (E.D.N.C. 1973), the Fourth Circuit recently affirmed a district court's holding that a hospital's purchase of supplies in interstate commerce and other interstate activities were merely incidental to its principal business of operating a hospital. The plaintiff had alleged that the restraint of trade operated upon this business, not the incidental interstate activities. Thus the court held it had no jurisdiction over the case. *Accord, Lieberthal* v. *North Country Lanes, Inc.,* 332 F.2d 269, 271 (2d Cir. 1964); *Elizabeth Hospital, Inc.* v. *Richardson,* 269 F.2d 167 (8th Cir. 1959); *Lawson* v. *Woodmere, Inc.,* 217 F.2d 148 (4th Cir. 1954).

In *Spears Free Clinic & Hospital* v. *Cleere,* 197 F.2d 125 (10th Cir. 1952), the Tenth Circuit was not persuaded by an argument that the alleged antitrust violations, which prevented the plaintiff hospital from taking patients, would

affect interstate commerce by lessening the number of patients who would come to Denver from other states. As the court put it:

> "To come within the purview of the Sherman Act the restraint of commerce or the obstruction of commerce must be direct and substantial and not merely incidental or remote.
>
> * * *
>
> A curtailment of the manufacture of articles to be shipped in interstate commerce or the lessening of the number of persons who travel in interstate commerce, resulting from a conspiracy to restrain or monopolize a wholly local activity, is ordinarily an incidental, indirect and remote obstruction to such commerce." 197 F.2d at 126, 127.

In the instant case, the fact that home buyers, mortgage money, and loan guaranties may in some other case cross state lines is merely incidental and quite remote from a lawyer's examination of title to the property involved in this case. Title examination, a purely local transaction, is merely incidental to the purchase and financing of real estate. The above cases teach that incidental and remote connections with interstate commerce will not serve to invoke Sherman Act jurisdiction. Otherwise, virtually *all* activity, no matter how local in operation and effect, would "substantially affect" interstate commerce. In effect, such a construction of the Sherman Act phrase "trade among the several States" would render it meaningless, a result surely intended neither by the framers of our Constitution, nor the drafters of the Sherman Act.

In summary, then, Petitioners concede that the challenged activity is not itself in interstate commerce. They

failed to show below that a lawyer charging a fee for handling a real estate transaction substantially affected interstate commerce. They failed even to demonstrate that what is solely a local activity in most circumstances operated substantially to affect interstate commerce in this particular case. Finally, they misapprehend the decisions of the federal courts which continue to require a showing of effect on interstate commerce, even in antitrust cases involving allegedly per se unlawful conduct.

It has never been sufficient to demonstrate that there is some incidental or remote interstate commerce effect that can be imagined or conjured up in lawyers' briefs. This Court's most recent decision on interstate commerce in an antitrust context demonstrates exactly that. In *Gulf Oil Corp.* v. *Copp Paving Co.* ..... U.S. ....., 43 U.S.L.W. 4059 (December 17, 1974), this Court considered whether a firm engaged in the purely local activity of manufacturing asphaltic concrete came within the scope of both the Clayton Act's "in commerce" test and the Sherman Act's "affecting commerce" test. This Court recognized that the Sherman and Clayton Acts established different jurisdictional standards. However, after finding that the activities were not "in commerce" under the Clayton Act, the Court further considered, at Copp's urging, whether the lesser jurisdictional requirements of the Sherman Act should be read into Sections 3 and 7 of the Clayton Act. This Court, after reviewing the evidence presented to the trial court, said:

> "Even if the Clayton Act were held to extend to acquisitions and sales having substantial effects on commerce, a court cannot presume that such effects exist. The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions [citations omitted].

This Court, applying the Sherman Act "effect on commerce" rule, sustained the lower court's finding of no effect.

Here Petitioners concede that a title examination, like the manufacturing of asphaltic concrete, is a local activity. Under *Copp,* therefore, Petitioners must prove that a title examination has in fact had adverse consequences on interstate markets and the interstate flow of goods in order to support Sherman Act jurisdiction. No such adverse consequences have been shown. If supplying asphaltic concrete for an interstate highway does not, without further proof, affect commerce, then surely neither does a title examination in Virginia of real estate located in Virginia by a Virginia attorney for a Virginia resident, irrespective of where the resident might have once lived, irrespective of whether or where he might borrow money to purchase his residence, and irrespective of where he might work.

B.

The Sherman Act Applies Only To "Trade Or Commerce" And Should Not Now Be Judicially Expanded To Reach The Legal Profession.

The Court of Appeals held that the promulgation of a fee schedule, part of an overall system to regulate the legal profession, was protected by a form of limited exclusion from the scope of the antitrust laws available to the "learned professions." 497 F.2d at 15. In the sections that follow, Fairfax demonstrates that the language of the Sherman Act does not apply broadly and mechanically to the "learned professions," that until very recently no court had even sug-

gested to the contrary, and that the fundamental ethical precepts embodied in the self-regulation of the legal profession throughout the nation support the conclusion of the Court of Appeals in this case.

In assessing these arguments of law and policy, this Court must bear in mind, as the cases indicate, that the antitrust laws must be put into the appropriate perspective. Although competition is a fundamental goal in the American economic system, it is not absolute in its commands or unmodifiable in its application. This Court and inferior courts have stated again and again that there are instances in which the goals of the antitrust laws must be balanced and weighed against other fundamental values to which our society owes allegiance.

A mechanistic application of the antitrust laws would be at odds with self-regulation of the learned professions in the implementation of self-imposed ethical standards. The concerns to which the Court of Appeals gave voice in the instant case, in the reconciliation of antitrust policy with the necessities of professional self-regulation, have appeared in every case that has considered this subject to date. This Court cannot ignore those considerations, and, as Fairfax demonstrates in this Brief, the Sherman Act and its policy, as articulated by the legislature and construed by the courts, do not apply to learned professions.

1. The Weight of Judicial Authority Supports the Exclusion of Ethical Self-Regulation of the Learned Professions from the Scope of the Sherman Act.

The Sherman Act forbids every "restraint of trade or commerce among the several States." The pivotal question is whether the practice of law is "trade or commerce" within the meaning of the Act. The overwhelming

weight of judicial authority is to the effect that the practice of law is not subject to the automatic application of the antitrust laws.[8]

The origin of the concept that certain conduct of the learned professions in general, and the legal profession in particular, is outside the scope of the Sherman Act, is found in two decisions of this Court. In *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931), this Court ruled that "learned professions" are not "trade or commerce." Speaking for the Court in that case, Justice Sutherland stated:

> "Of course, medical practitioners . . . are not in competition with respondent. They follow a profession and not a trade . . . ." *Id.* at 653.

The practice of law had been similarly labeled by Justice Holmes in an earlier opinion of this Court:

> "[P]ersonal efforts not related to production, is not a subject of commerce . . . . [A] firm of lawyers sending out a member to argue a case . . . does not engage in such commerce because the lawyer . . . goes to another state." *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U.S. 200, 209 (1922).

These statements foreshadowed this Court's clear distinction between trade, covered by the Sherman Act, and the learned professions, outside that statute's scope. In *Atlantic*

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[8] The legislative history of the Sherman Act is inconclusive. The Solicitor General's "presumption" (see Brief for the United States, 23 at n. 18) is facile and without any support. It would be more precise to state that the question of the applicability of the Sherman Act to fee schedules was raised in the congressional debates but never answered. Note, however, that the debates make clear that the Department of Justice is in error in suggesting in its Brief (p. 15) that the widespread use of suggested fee schedules is a comparatively recent phenomenon.

Cleaners & Dyers v. *United States*, 286 U.S. 427 (1932), the Supreme Court determined that the word "trade" in the Sherman Act was used in the "general sense attributed to it" by Justice Story in *The Schooner Nymph*, 18 Fed. Cas. 506, 507, No. 10388 (C.C. Me. 1834).

> "Wherever any occupation, employment or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts *or in the learned professions* [emphasis added], it is constantly called a trade." 286 U.S. at 436.

In *Atlantic Cleaners & Dyers*, this Court knitted together 100 years of judicial interpretation to exclude the profession from the term "trade" in the Sherman Act.

This Court has never changed its position that the learned professions are not within the scope of the phrase "trade or commerce," as used in the Sherman Act. In the years since *Atlantic Cleaners & Dyers*, this Court has had several opportunities to express contrary views, and on each occasion declined.

In *American Medical Association* v. *United States*, 317 U.S. 519 (1943), this Court expressly refused to "consider or decide" the question whether the practice of medicine constituted "trade" under the Sherman Act. In view of that refusal, it is surprising that Petitioners place such great reliance on that case in their brief (38-41). The case concerns the sufficiency of an indictment in which it was charged that the purpose and effect of the alleged restraint was to inhibit the competitive potential of a cooperative group health service. Second, even the court of appeals recognized "the importance of rules of conduct in medical practice, rules which can best be made by the profession itself." 110 F.2d 703, 711 (D.C. Cir. 1940). That justification could not be considered in *AMA* because there was no record, as there is here, of the importance of the

restraint to the profession's self-regulation. The opinion in the D.C. Circuit thus leaves open the question whether ethical regulations justify the restraint. In light of these factual differences and in view of this Court's earlier statements on the scope of the Sherman Act and the learned professions, the Petitioners in this case can hardly take comfort from this Court's silence in *AMA*.

Likewise, in *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 491-92 (1950), and again in the light of the history of its pronouncements on the status of the learned professions under the Sherman Act, this Court refused to equate "trade" with the learned professions. Even more significantly, in a 1952 case, *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 336, Justice Jackson explained the Supreme Court's traditional views on the subject:

> "This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."[9]

Thus, in a string of Supreme Court cases covering more than fifty years, learned professions, including the legal profession, have been placed outside the concept of "trade or commerce" of the Sherman Act.

Where this Court has led the way, lower courts have followed. In *Marjorie Webster Junior College, Inc.* v. *Middle*

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[9] See also *United States* v. *South-Eastern Underwriters Ass'n*, 323 U.S. 533, 573 (1944) where Chief Justice Stone pointed out in his dissent that no one considered the practice of law to be commerce: "The practice of law is not commerce, nor, at least outside the District of Columbia, is it subject to the Sherman Act, and it does not become so because a law firm attracts clients from without the state or sends its members or juniors to other states to argue cases, or because its clients use the interstate mail to pay their fees." (Citing *Federal Baseball Club.* v. *National League*). The majority apparently did not disagree.

States Association of Colleges and Secondary Schools, Inc., 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970), the court of appeals acknowledged that the Sherman Act had been " 'tailored . . . for the business world,' " [citing *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961)] not for the non-commercial aspects of the liberal arts and the learned professions.

> "In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, [citation omitted] is not sufficient to warrant application of the antitrust laws. 432 F.2d at 654.

In *Riggall* v. *Washington County Medical Society*, 249 F.2d 266, 268 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958) the court of appeals likewise wrote that the practice of the medical profession was "neither trade nor commerce within § 1 of the Sherman Anti-Trust Act. . . ."

The Court of Appeals in this case thus is only the most recent appellate court to have considered the question. Its carefully limited exclusion of aspects of the practice of law from the scope of the Sherman Act is the most extended and considered judicial opinion on the subject.

State courts that have recently considered the subject have excluded from the scope of the antitrust laws certain activities of the legal profession, and in particular the promulgation of suggested minimum fee schedules. In *Estate of Freeman* v. *Freeman*, 355 N.Y.S.2d 336, 34 N.Y.2d 1, 311 N.E.2d 480 (1974), Chief Judge Breitel held that the state law counterpart of the Sherman Act did not apply to the practice of law. Reasoning that a profession is not a business because of its extensive requirements of formal training, limited admission, self-imposition of ethical codes and the duty to subordinate financial rewards to social responsibility, the court concluded that the "history and purpose of the legal profession and the professional associations supports [sic] the view that the profession is not included within the terms 'business or trade' as used in § 340 of the General Business Law." 355 N.Y.S. 2d at 340.

The same theory applies to what are virtually identical terms in the Sherman Act. Likewise, in *Stafford* v. *Brennan*, 498 S.W.2d 703 (Tex. Civ. App. 1973), the court sustained the validity of the suggested minimum fee schedule against state antitrust attack, stating in terms particularly applicable here:

> "The minimum fee schedule is nothing more than a voluntary information guide or check list. The fee schedule is neither enforced by compulsion, coercion, nor through the Canons of Ethics. . . ." 498 S.W.2d at 707.

Thus, the court held that a provision of Texas law establishing a presumption of reasonableness for a fee prescribed in the minimum fee schedule "does not impose a restraint on competition or trade." 498 S.W.2d at 708.

The only contrary opinion as to the legal profession is found in *United States* v. *Oregon State Bar*, Civil No. 74-362 (D. Ore., filed Nov. 22, 1974), a recent decision of the United States District Court for the District of Oregon denying summary judgment and declining to follow even the carefully limited reasoning of the Fourth Circuit.[10] Once

[10] In its brief the government includes as an appendix *United States* v. *National Society of Professional Engineers*, Civil Action No. 2412-72 (D.D.C., filed Dec. 19, 1974), in which the district court held that certain restrictions on the conduct of professional engineers were not protected by a learned profession exemption. The Chief Judge of the same District Court reached the opposite conclusion in *Bank Building & Equipment Corp.* v. *National Council of Architectural Registration Boards et al.*, Civil Action No. 74-896 (D.D.C., filed Jan. 13, 1975), in which it is expressly held that "the practice of a learned profession is not trade or commerce within the meaning of the Sherman Antitrust Act, 15 U.S.C. § 1." (Memorandum Opinion p. 4).

again, however, as in *AMA,* because of the procedural posture of the case, the record was devoid of the crucial linkage between the challenged conduct and the profession's self-regulation.

For over a hundred years, judicial interpretation of the term "trade" has been overwhelmingly to the effect that the learned professions were excluded. Even after the enactment of the Sherman Act and following the expansion of the term trade," this Court continued to issue opinions in which the learned professions, and particularly the practice of law, were excluded from the statute's scope. Such authority apparently must have been persuasive even to the Antitrust Division, which for 84 years following the enactment of the Sherman Act declined even to bring suit against a bar association for the promulgation of a suggested minimum fee schedule.

Thus, at least since the clear language of *Atlantic Cleaners & Dyers* in 1932, the legal profession has been free to develop on the assumption that its activities related to self-regulation, as the record shows the advisory fee schedule most assuredly is, are not subject to the antitrust laws.

2. Judicial Authority Excluding the Practice of Law from the Scope of the Sherman Act Reflects the Importance of the Profession's Ethical Self-Regulation.

As the Fourth Circuit pointed out below, it is not surprising that the courts have repeatedly distinguished between the professions and the more conventional activities of trade and commerce. In particular, the unique characteristics of the legal profession, and its self-discipline in the form of the Canons of Ethics and Code of Professional Responsibility, provide sound policy grounds for withholding the mechanical application of the antitrust laws. This country has opted thus far for a legal profession that was more in the nature of a regulated industry than blatantly competitive. The self-regulation of the profession is at the very heart of the considerations that have led courts to exclude the practice of law from the scope of the Sherman Act.

In Virginia, the discipline of competition has been replaced by the regulatory mechanism of the State Bar. The practice of law is comprehensively supervised and regulated by the State Bar, and by the subsidiary city and county bar associations. Entry into the profession is controlled through the bar examination and licensing procedure. Poor services are prevented by enforcement of the Canons of Ethics, and proper fee practices are mandated by the Canons of Ethics as supplemented by the advisory fee schedules. Regulation thus substitutes for competition as the governor of the legal profession.

Indeed, introduction of all forms of competition into the legal profession would be destructive, not only of the profession in its current form, but of the quality legal services that lawyers currently provide. The theory of destructive competition holds that, when price comparisons are determinative to most consumers, and when those consumers are unable to make quality comparisons among lawyers' services, there exists a positive disincentive for the investment of time in legal activities. The inevitable effect would be to reduce the quality of legal services. The greater the difficulty of the consumer in judging quality,

> "... the greater the temptation of competitors to cut corners, since the competitor that skimps does not at once lose all his customers, while the one that scrupulously maintains quality may be inadequately rewarded

for the higher costs of doing so." 2 Kahn, *The Economics of Regulation* (New York 1971) at 176.

The facts of this case focus on the practice of real estate law. The price of destructive competition would be devastatingly high in that area of the practice of law. A deficiency in a title examiner's work might remain hidden for years. In most cases only when a family sought to sell its home, after years of residence and paying mortgage lenders, would it become evident that cheap, though faulty, legal work had deprived the family of the benefits of quiet title.

It should never be a defense to any complaint against a negligent lawyer that the customer got only what he paid for. Faulty legal work should be unprofessional, no matter the cost to the lawyer or the price to the client. Unless this Court is prepared to require abandonment of ethical responsibilities in favor of total reliance on the forces of competition, self-regulation that state bars and bar associations have historically imposed upon their members must be insulated from mechanical and inflexible application of the antitrust laws.

Bar associations have promulgated advisory schedules to facilitate compliance with Canon 12 and DR 2-106(B)(3) of the Code of Professional Responsibility, which charge lawyers with the responsibility for determining their fees, at least in part, in accordance with what is customarily charged in the locality for similar legal services. If the antitrust laws are now to prohibit those schedules as price fixing, the profession may no longer lawfully restrict advertising of prices, since that too would be a form of price fixing. *See, e.g., United States* v. *Gasoline Retailers Association, Inc.*, 285 F.2d 688 (7th Cir. 1961). That same legal profession would also be required to abandon rules against improper solicitation, since any agreement among

competitors to refrain from competition is unlawful per se. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951). Fee-splitting for referrals, pricing on a contingent basis for criminal cases, charging whatever the traffic would bear for legal services—all practices now forbidden under the applicable ethical codes governing the legal profession—would be permissible if the Sherman Act is held to apply in this case. Indeed, any form of self-regulation restraining or modifying all-out competition would subject the profession to antitrust liability. The day after any holding from this Court that the antitrust laws apply with full force, every lawyer in practice will be required to decide whether to obey the ethical canons of the bar association to which he belongs, or whether on the contrary, whether to replace his shingle with a billboard.

Other unforeseen and certainly unintended consequences could flow from such a holding. Lawyers considering the establishment of a partnership, or the amalgamation of law firms, would under some circumstances be required to analyze their plans under the standards of § 7 of the Clayton Act prohibiting anticompetitive mergers. Special fee arrangements for a retainer client might be regarded as unfair methods of competition in violation of price discrimination laws, or, at the very least, exclusive dealing, violative of the Sherman Act. A single law firm in a small town, rather than serving all who need legal services as the Code of Professional Responsibility now requires, might be constrained to consider turning down business to avoid violation of the monopolization provisions of § 2 of the Sherman Act.

Lawyers are not merchandisers, manufacturers or servants in the traditional commercial sense. Their conduct is governed by a special set of rules, where the maximization

of profit—the talisman of the competitive free enterprise system—is not the *summum bonum*. A court urged to alter the traditional canon of interpretation of the term "trade or commerce" of the Sherman Act must face the certain fact that it is remaking the legal profession. This Court has avoided ordering such a restructuring on the sound grounds that self-discipline in this instance is preferable to competition.

3. The Alteration of the Scope of the Sherman Act Should Not be Undertaken by Judicial Legislation.

Petitioners and the government in this case ask this Court to depart from a line of cases that has long permitted the legal profession to develop freely as a "learned profession" on the assumption that its activities are not subject to mechanical and inflexible application of the antitrust laws. Not even the Department of Justice, until very recently, conceived of the notion that the legal profession was engaged in price fixing. Indeed, as the record demonstrates (A. 49, 54), the Antitrust Division of the Department of Justice approved these very fee schedules against which they now so self-righteously contend.

But this Court has cautioned that "it is not for the courts to indulge in the business of policy-making in the field of antitrust legislation." *United States* v. *Cooper Corp.*, 312 U.S. 600, 606 (1941). To subject the practice of law at this point to the strictures of the antitrust laws would be to cast doubt upon an entire regulatory scheme that has served the profession well and enabled it to adjust to the changing realities of this nation's life. If accommodations are to be made, they should be made by the legislature, at either the national level or in the various states. As the Court of Appeals below stated,

> "In our governmental system a legislative body is better equipped to accommodate these restrictions [resulting from the profession's ethical standards] imposed upon the practice of a profession to the overall design and purpose of the antitrust laws." 497 F.2d at 19.

Here, then, we have a parallel to this Court's determination of the judicially erected exclusion from the scope of the Sherman Act for professional baseball. Here, as in *Flood* v. *Kuhn*, 407 U.S. 258 (1972), this Court is faced with cases providing an exclusion from antitrust coverage, answered only by the silence of Congress. In *Flood*, this Court refused to overule its prior decisions excluding baseball from the coverage of the Sherman Act:

> ". . . We continue to be loath, fifty years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond more inference and implication, has clearly evinced a desire not to disapprove them legislatively.
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> * * *
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> And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial action." 407 U.S. at 283-85.

In 1922, Mr. Justice Holmes wrote that the practice of law was not commerce subject to the antitrust laws. In 1931, this Court ruled that "learned professions" are not "trade or commerce." In 1932, the Court again excluded the "learned professions" from "trade." In 1949, the Court again declined to equate "trade" with the learned professions. In 1952, Mr. Justice Jackson wrote that competition, conventional in the business world, was not proper for a pro-

fession. Mr. Chief Justice Stone had pointed out in 1944 that the practice of law was not commerce so as to be subject to the antitrust laws.

In spite of repeated statements to this effect both by this Court and by lower courts, Congress has not seen fit to take any action to correct those distinguished justices and judges if they were wrong. What Congress has not done since 1922 this Court should not rush to do now. The subjection of lawyers across the country not only to remedial but to punitive laws is a fate that, in view of this Court's reluctance to repudiate earlier decisions despite opportunities to do so, it should now refuse to impose.

C.

The Fairfax Advisory Fee Schedule Is Exempt From Antitrust Challenge As Conduct Sanctioned And Approved By State Regulation.

The federal antitrust laws are not applied to disrupt state regulation. In *Parker* v. *Brown,* 317 U.S. 341 (1943), the Supreme Court provided a rationale for this balancing of policies and held private action occasioned by state regulation exempt from antitrust challenge.

This case presents the conflict between state regulatory requirements and federal antitrust policy in stark terms. Fairfax published an advisory fee schedule prompted and sanctioned by appropriate state regulatory authority. Petitioners seek to challenge that conduct under the antitrust laws. *Parker* v. *Brown* teaches that this conflict should be resolved in favor of state regulation.

1. Fairfax's Advisory Fee Schedule Was Promulgated Pursuant to a Valid Program of Regulation Established by the Commonwealth of Virginia.

The Commonwealth of Virginia seeks to maintain high standards of performance and behavior within the legal profession. That policy is clearly reflected in its statutes regulating the practice of law and the Virginia Supreme Court's adoption of the Canons of Ethics and the Code of Professional Responsibility. These statutes and the Supreme Court's Rules, together with the implementing activities of the State Bar, constitute the basis of the regulatory scheme supporting that valid state policy.

The Court of Appeals below found that the state policy embodied in the Code of Professional Responsibility was in the public interest. This Court likewise came to that conclusion in *Lathrop* v. *Donohue,* 367 U.S. 820, 843 (1961):

> "Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal services available to the people of the State .... It cannot be denied that this is a legitimate end of state policy."

See also *Semler* v. *Oregon State Bd. of Dental Examiners,* 294 U.S. 608, 612 (1935) ("What is generally called the 'ethics' of the profession is the consensus of expert opinion as to the necessity of such standards.").

The Virginia State Bar is created by statute and authorized to supervise and regulate the activities of lawyers in Virginia. Va. Code §§ 54-48 *et seq.* As the administrative agency of the Supreme Court of Virginia, the State Bar administers rules and regulations promulgated by the Su-

preme Court to govern the conduct of attorneys.[11] The Virginia statutes give the Supreme Court of Virginia general authority to prescribe a code of ethics governing the professional conduct of lawyers. See Va. Code § 54-48(b). Among these ethical rules are, for instance, prohibitions against charging excessive fees and against advertising.

Of particular importance to this case, pursuant to that statutory authority, the Supreme Court has promulgated the Canons of Ethics and the Code of Professional Responsibility, which, as the District Court found, *contemplate and approve* fee schedules. Findings of Fact 6, Ad. 1.

Canon 12 of the Canons of Ethics provided that, in setting a fee, a lawyer may properly consider, in addition to five other factors, "the customary charges of the Bar for similar services." Canon 12 further provided that, in determining those customary charges, a lawyer could properly "consider a schedule of minimum fees adopted by a Bar Association." The Virginia Code of Professional Responsibility, which succeeded the Canons of Ethics in 1971 and was adopted as part of the Virginia Supreme Court Rules, provides in EC 2-18:

> "Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees." (*Ibid.*)

Similarly DR 2-106(B)(3) of the Code of Professional Responsibility provides that one factor to be considered in determining the reasonableness of a fee is "[t]he fee customarily charged in the locality for similar legal services." (*Ibid.*)

[11] The State Bar's authority to investigate complaints of unprofessional conduct is the enforcement backbone of the regulatory scheme provided by the Commonwealth for licensed lawyers.

As a group, these ethical rules promulgated by the Supreme Court of Virginia constitute a coherent and consistent approval of the minimum fee schedule concept as a guide to reasonableness of fees. The legislature authorized the Supreme Court to issue the ethical rules. In its special role as regulator of the legal profession, the Supreme Court chose to adopt the minimum fee schedule concept as an integral part of its ethical regulation. Nothing could more clearly set forth state policy than this fabric of Supreme Court rules admonishing every lawyer to consider minimum fee schedules as evidence of reasonable, and therefore ethically sound, fees.

But the Supreme Court has gone further to enforce the regulation of lawyers' fees in Virginia through the adoption of minimum fee schedules. The Virginia Supreme Court has authorized the State Bar to render advisory opinions on questions of professional conduct. Findings of Fact 10, Ad. 1; Stip. 19, Ad. 18. At least two such opinions of the State Bar Committee on Legal Ethics signify the intention of the State Bar to regulate personal solicitation, an ethics offense, by the use of suggested fee schedules.

In Opinion No. 98, issued June 1, 1960, the Ethics Committee ruled that a form of prohibited personal solicitation occurs when an attorney, for the purpose of increasing his legal business, intentionally and regularly charges less than the customary charges of the local bar for similar services, as reflected in a schedule of suggested minimum fees. (A. 45). In Opinion No. 170, May 28, 1971, the Ethics Committee determined that advisory fee schedules are one element to be considered along with those set forth in Canon 12 and DR 2-106(B) in determining a proper fee, and that habitual charging of less than the minimum fee schedule for the purpose of solicitation may constitute evidence of professional misconduct. (A. 47).

These opinions by the State Bar, binding on every Virginia lawyer, expressly approve the use of advisory minimum fee schedules. Yet another instance of state approval occured in 1962 and 1969, when the State Bar published Minimum Fee Schedule Reports setting forth and analyzing the existing fee schedules promulgated by various local bar associations in Virginia. The 1969 Report stated:

> "The recommended minimum fee figures in the committee's report represent the consensus recommendation of members of the committee as to fees which should be assessed in 1969 for the legal services indicated." (A. 25; Findings of Fact 12, Ad. 2).

The State Bar relies upon local bar associations, in accordance with EC 2-18 and DR 2-106, to promulgate fee schedules, using the State Minimum Fee Schedule Reports as a guide. *See* Virginia State Bar, Minimum Fee Schedule Report 3 (1969) (A. 25). Implicit in this reliance is the expectation that local associations will possess the flexibility to adjust the state-recommended fees to local circumstances. *Id.* Thus, Fairfax, attuned to local circumstances, promulgated its advisory fee schedule to facilitate the Supreme Court's, and therefore, the State Bar's regulation of fee practices.

In summary, provisions of the Canons of Ethics and Code of Professional Responsibility, approving minimum fee schedules, together with the Ethics Committee Opinions and the language of the Minimum Fee Schedule Reports issued by the State Bar, demonstrate that local bar associations, including Fairfax, have issued suggested fee schedules to facilitate compliance with and as an integral part of state regulatory requirements. The suggested fee schedules were the

result of and subject to a scheme of state regulation of lawyers' activities, including in particular fee practices, effectuated through supervision and regulation of lawyer members of the Virginia State Bar.

2. The Policy Established in Parker v. Brown Dictates that Federal Antitrust Enforcement Should Yield to Conflicting State Regulation.

In *Parker* v. *Brown,* 317 U.S. 341, 350 (1943), a unanimous Supreme Court held that a program to regulate the marketing of raisins, proposed by private producers but adopted and enforced by a state agency, was the product of state action and therefore not subject to antitrust attack. The Court assumed at the outset of its Sherman Act analysis "that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." *Id.* at 350. The Court further assumed that Congress could have preempted the California regulation because of its effect on interstate commerce. The key to this Court's analysis lay in the fact that the prorate program was not a purely private undertaking.

> "It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is

not lightly to be attributed o Congress." *Id.* at 350-51.

Thus this Court held that the Sherman Act was not intended to apply to the prorate program, even though its organization was proposed by the private procedures. Significantly, "it . . . [was] the state, acting through the Commission, which adopt[ed] the program and which enforce[d] it with penal sanctions, in the execution of a governmental policy." *Id.* at 352.

In the instant case, the Commonwealth of Virginia, acting through the legislature, the Virginia Supreme Court, and the State Bar has determined that personal solicitation of business within the context of the legal profession has undesirable consequences for the public. Such solicitation is therefore proscribed by the Canons of Ethics and the Code of Professional Responsibility. Furthermore, the Commonwealth has determined that local minimum fee schedules are an appropriate means of regulating this ethics offense. Thus, the State Bar prompted local bar associations to promulgate advisory fee schedules, and lawyers who habitually undercut those schedules subject themselves to professional discipline. Fairfax's suggested fee schedule was thus occasioned by adherence to this state regulation of lawyers' activities.

In addition, the fee schedule was not intended to be effective in the absence of this state regulation. All authority to investigate and enforce the schedule rested in the State Bar and the Virginia Supreme Court. Thus, as in *Parker,* the state, acting through the State Bar and Supreme Court, urged and in effect necessitated local advisory fee schedules and "enforce[d] [them] with . . . sanctions, in the execution of a governmental policy." 317 U.S. at 352. In these circumstances, to hold that local promulgation of an advisory fee schedule violated the antitrust laws would subject these lawyers to contradictory legal standards. For precisely this reason, the *Parker* v. *Brown* doctrine establishes the priority that state regulation shall prevail.

Although a majority of the Fourth Circuit panel below recognized the dilemma faced by Virginia lawyers subject to conflicting regulatory demands, 497 F.2d at , the Court of Appeals applied the doctrine of *Parker* v. *Brown* too restrictively. In effect the Fourth Circuit held that challenged conduct, to be exempt under the doctrine of *Parker* v. *Brown,* must derive its authority and efficacy directly and specifically from a legislative command of the state. In addition, the Court of Appeals held that the activity must be subject to active, independent state supervision.

Although *Parker* was literally concerned with an explicit legislative command, the policy rationale of *Parker* applies with equal force to any valid state regulation, whether found in an express legislative directive or an administrative regulation issued pursuant to general legislative authorization. Lawyers in Virginia are legally obligated to comply with the Code of Professional Responsibility and the Ethics Committee Opinions of the Virginia State Bar just as surely as they are obligated to comply with an explicit and direct legislative command. To hold that the *Parker* doctrine does not apply here because the state regulation derives from general legislative authorization rather than a specific legislative command would defeat the purpose of the doctrine.

Contrary to the holding of the Court of Appeals, *Parker* v. *Brown* does not require "active, independent" state supervision of the challenged conduct.[12] Such language appears

[12] *See Washington Gas Light Co.* v. *Virginia Elec. and Power Co.,* 438 F.2d 248 (4th Cir. 1971); *Allstate Insurance Co.* v. *Lanier,* 361 F.2d 870 (4th Cir.), *cert. denied,* 385 U.S. 930 (1966).

nowhere in the *Parker* opinion. Rather, *Parker* holds that it is sufficient that the challenged conduct have been occasioned by adherence to state regulation. In any event, the mere fact that the State Bar happens to be run by lawyers does not affect its status as a governmental entity created by statute and authorized to regulate the conduct of lawyers in Virginia. Lawyers must comply with that regulation regardless of the State Bar's actual composition. Moreover, the Virginia Supreme Court, whose justices are unquestionably independent, is vested with ultimate supervisory responsibility for the conduct of lawyers in Virginia.

Therefore, all the elements of *Parker* immunity are present in the instant case. To maintain the necessary balance between federal antitrust enforcement and state regulation, *Parker* requires that the Sherman Act should in this case yield to Virginia's regulation of lawyers' fee practices as effectuated in the promulgation by Fairfax of a suggested schedule of fees.

D.

The Fairfax County Bar Association's Suggested Fee Schedule Does Not Constitute Price Fixing.

Even if the antitrust laws apply to the challenged conduct of Fairfax, a close examination of the facts will demonstrate no antitrust liability. First, the mere suggestion of appropriate prices for the lawful purpose of aiding compliance with state regulation, without more, does not constitute price fixing. Second, even if the suggested fee schedule is deemed price fixing, the presence of a regulatory scheme reflecting countervailing policy considerations and the uncertainty as to the competitive effects of bar association fee schedules warrant a rule of reason analysis rather than the cruder per se treatment.

1. Fairfax's Promulgation Of an Advisory Fee Schedule Serves a Legitimate Regulatory Purpose and Does not Have the Effect of Fixing Prices.

The Supreme Court has held that exchange of price information among competitors that serves a legitimate purpose does not constitute price fixing. In *Maple Flooring Manufacturers Ass'n* v. *United States,* 268 U.S. 563 (1925), the defendant association had disseminated statistics on average production costs, freight rates, and prices. Noting that the availability of such information to members of the association would tend to produce price uniformity, the Court nevertheless held that § 1 had not been breached. Significantly for this case, the defendants had not agreed to use the information to fix prices, nor did the information exchange provide a basis of inferring such agreement. *Id.* at 586. Rather, the kinds of data provided there, like fee schedules, were "legitimate subjects of enquiry and knowledge . . . ." *Id.* at 585.

On the same day, this Court decided *Cement Manufacturers Protective Ass'n* v. *United States,* 268 U.S. 588 (1925). In that case the defendants had gathered and disseminated information as to production, selling prices on specific job contracts, and transportation costs. The defendants once again had not agreed to use this information for the purpose of fixing prices and each member was free to determine his own level of production and prices. Because this exchange of information served a legitimate purpose—prevention of fraud—rather than price-fixing objectives, the Court held that it did not violate § 1 of the Sherman Act.[13]

[13] Similarly, in *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344 (1933), this Court upheld a common sales agency plan even though it was assumed that actual operation of the plan might have some tendency to stabilize prices. Decisive was the absence of any showing that the defendants' plan contemplated or necessarily entailed control of prices.

Although this Court recently struck down a particular variety of price information exchange in *United States* v. *Container Corp.*, 393 U.S. 333 (1969), this Court distinguished *Cement Manufacturers:*

> "While there was present here, as in *Cement Mfrs. . . .*, an exchange of prices to specific customers, there was absent the controlling circumstance, *viz.*, that cement manufacturers, to protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job." *Id.* at 335.

Thus *Container* holds that an exchange of price information not intended to fix prices and having a legitimate purpose does not constitute unlawful price fixing.

Lower court decisions, relying upon the *Container* distinction of *Cement Manufacturers,* have held that the Sherman Act does not prohibit communications as to price between competitors for the purpose of establishing the meeting competition defense provided in the Robinson-Patman Act. In *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), for example, competitors had engaged in price verification communications with a view toward establishing the meeting-competition defense. Although the court recognized that this exchange of pricing information "len[t] itself easily to concerted price fixing activities and to an unconscious direct retardation of the downward trend of prices," it held that the purpose to comply with the Robinson-Patman Act was a "controlling circumstance" making the information exchange legitimate under the antitrust laws. *Accord, Gray* v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973); *Webster* v. *Sinclair Refining Co.*, 338 F.Supp. 248 (S.D. Ala 1971).

There exists in the instant case a circumstance no less compelling and controlling. Fairfax's suggested fee schedule was not intended to fix fees but merely to provide information to member lawyers to help them comply with ethical regulation by the Virginia State Bar. More specifically, the schedule sought to advise members of Fairfax as to the fees "customarily charged in the locality for similar services." Virginia Code of Professional Responsibility, DR 2-106(B)(3), Findings of Fact 13, Ad. 4-5; Canon 12 of the Canons of Ethics, Findings of Fact 13, Ad. 2-3. Habitually charging less than such fees can constitute prima facie evidence of the ethics offense of personal solicitation. Virginia State Bar Opinions Nos. 98 and 170 (A. 45, 47).

The statement of purpose of the Fairfax advisory fee schedule makes clear that the schedule was advisory only.

> *"This schedule of proposed minimum fees is advisory only and is intended to be applied as a guide in determining the conduct of the local bar as to what should be charged as a minimum under the circumstances. . . . In all cases, the individual lawyer has the responsibility of determining a proper fee under all circumstances.* There is no intention to require that the individual lawyer should use this schedule as a means of avoiding his ultimate responsibility to fix a fair and reasonable fee considering all of the circumstances of a particular case.
>
> * * *
>
> Each lawyer must establish his own fees and the suggested minimum fee schedule set forth herein is to be used by lawyers as a guideline in appropriate cases. This document is not intended and should never be used to replace the individual discretion of attorneys to set their fees depending upon the particular circumstances of each particular case." (A. 38, 39) (emphasis added).

All Virginia lawyers are constrained by the Code of Professional Responsibility to look at the fee customarily charged in their locality for similar legal services only as *one* of eight factors to be considered as guides in determining the reasonableness of a fee. *See* Virginia Code of Professional Responsibility, DR 2-106, Findings of Fact 13, Ad. 4-5; Virginia State Bar Opinion No. 170 (A. 47).

Thus it can only be concluded that the schedule was merely advisory and that members of Fairfax did not agree to fix fees. Rather, the schedule was promulgated, not for purposes of price fixing, but merely as an integral component of state regulation. In view of this legitimate regulatory purpose and the absence of any agreement or intent to fix prices, the schedule should not be treated as price fixing.[14]

Moreover, not only was there no intention or agreement on the part of Fairfax to fix fees, promulgation of the advisory fee schedule did not have that effect. The schedule was not consistently adhered to by members of the Association. Findings of Fact 18, 21, Ad. 5. F. Shield McCandlish, an attorney with great experience in real estate settlements, testified that of the total of 620 transactions closed by his firm in Reston, Virginia, within the last four years, the schedule fee was not charged in nearly 400 cases. (A. 97). Even when the schedule fee was charged, it was only after an evaluation of its fairness, the status of the purchaser, the source of payment, and recent similar transactions. (A. 105-07). Thus in no case was a suggested fee charged *qua* minimum fee.

John T. Hazel, Jr., another attorney in northern Virginia, testified that he made no reference to the advisory fee

[14] *Cf. United States* v. *Container Corp.*, 393 U.S. 333 (1969); *Board of Trade* v. *United States*, 246 U.S. 231 (1918).

schedule in his practice and that his firm did so only occasionally. (A. 112). Joseph T. Duvall, President of the Fairfax Bar Association, stated that the fee schedule was widely regarded as advisory, primarily for the benefit of young lawyers and retired government lawyers who might be unacquainted with reasonable fees in northern Virginia. Mr. Duvall stated that he himself did not adhere to the fee schedule and that his firm charged both more and less than the schedule depending upon the nature of services rendered in real estate transactions. (A. 118, 120).

Thus the evidence presented below demonstrated that the fee schedule was regarded as advisory and that nonadherence was the pattern in northern Virginia. The sole evidence presented by Petitioners on the question took the form of inquiries placed to 35 lawyers. Each lawyer was asked by letter to quote his fee for handling a real estate closing involving an unspecified amount. Some 19 replied that their fees were in general the same as that quoted in the fee schedule. Without information necessary to utilize the seven other factors listed by the Canons of Ethics and the Code of Professional Responsibility, those lawyers, in order to be responsive, were limited to an assessment based on the only known factor—the suggested fee schedule. The fees quoted might well have been different had the Goldfarbs personally interviewed each lawyer. Moreover, Petitioners neither attempted to discover the nature of fees charged by those who did not respond to the mass solicitation, nor in connection with one letter, from Mr. King, did they respond to a proffered invitation to consult the law firm to determine its fee. (A. 94-95).

Finally, Fairfax never attempted to circulate its advisory fee schedule to its members. Fairfax made it available at the courthouse for those lawyers who wished to have it, but no

effort was made to distribute it among the membership. (A. 119-20).

Thus it is clear that Fairfax's fee schedule was neither intended nor used to fix fees. There was no showing at the trial court level that price fixing was contemplated or that the fee schedule entailed control of fees. Indeed, the lower court found that there was no evidence of any effect on fee levels whatever. Findings of Fact 54, Ad. 16. Therefore, Fairfax did not engage in price fixing.

United States v. *National Association of Real Estate Boards,* 339 U.S. 485 (1950), which held that a standard rate schedule of commissions constituted price fixing, may be distinguished from the case at bar. In *Real Estate Boards* the association's code of ethics provided: "Brokers *should* maintain the standard rates of commission adopted by the Board and *no* business should be solicited at lower rates." (emphasis added). All members of the association agreed to abide by the code.

Fairfax expressly admonished its members that the schedule *should not* supplant individual judgment in the setting of fees for legal services. No Fairfax members agreed to adhere to the advisory fee schedule, nor did they generally adhere to it in practice. The schedule was merely used as one element among several to be considered in determining a reasonable fee and to aid lawyers in avoiding the ethics offense of personal solicitation.

In summary, the fee schedule was merely advisory, it served a legitimate regulatory purpose, and it had no effect of fixing fees. Therefore, the promulgation of a schedule of suggested fees is not price fixing under the standards of this Court.

2. The Advisory Fee Schedule, Even If Characterized As Price Fixing, Does Not Constitute A Per Se Violation Of The Sherman Act.

Under ordinary circumstances price fixing is of course illegal per se. *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). Courts have, however, carved out two categories of exception to the general per se treatment accorded practices such as price fixing, group boycotts, and the like. First, the rule of reason and not the per se rule should be utilized in deciding a novel and complex antitrust question concerning an important sector of the economy. Second, the per se rule should yield to the rule of reason in cases involving the interaction of regulation with antitrust enforcement.

In *White Motor Co.* v. *United States,* 372 U.S. 253 (1963), this Court refused to invoke the per se rule in connection with a vertical territorial limitation. This Court's rationale for its holding is particularly pertinent to the case at bar:

> "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain [whether they are naked restraints of trade with no purpose except stifling of competition]. . . . We need to know more than we do about the actual impact of those arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' . . . and therefore should be classified as per se violations of the Sherman Act." *Id.* at 263.

Recently, the Eighth Circuit followed *White Motor* in holding that an alleged group boycott, ordinarily a per se violation of § 1 of the Sherman Act, should be judged according to the rule of reason in the context of the bank

credit card business. *See Worthen Bank & Trust Co.* v. *National BankAmericard, Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974). The plaintiff argued that *White Motor* referred only to a distinction between horizontal territorial and customer restrictions, on the one hand, and vertical restrictions on the other. The court rejected this argument saying that "the novelty and importance of the question [in *White Motor*] was the determining factor in applying the rule of reason rather than the fact that a vertical rather than a horizontal restraint was imposed." *Id.* at 126. Because of the relative newness and importance of the bank credit card industry, the "lack of definitive information relating to competition therein", and the novelty of the question, the court rejected the rigid per se approach.[15] *Id.* at 129-30. *Accord, Carlson Companies, Inc.* v. *Sperry and Hutchinson Co.*, 374 F.Supp. 1080 (D.Minn. 1973).

The *White Motor* rationale applies to the case at bar. Until the district court decision in this case, no court had ever applied the antitrust laws in the context of the legal profession. Such enforcement may well have unforeseeable and undesirable consequences, for the benefits ordinarily accruing from completely unregulated price competition do not necessarily follow in the market for professional services. Conventional economic theory, which holds that competition tends to produce good quality at the optimum price, may not apply in a market for legal services. The average client cannot rationally evaluate the quality of legal services. He has no way of knowing, for example, whether one title examination or will is better than another—at least for a very long period of time. He may, for example, irrationally

[15] Interestingly, in that case, the Antitrust Division offered a brief *amicus curiae* urging the court's adoption of the rule of reason.

equate an adverse court decision with poor legal services. Having no way of judging the quality of the services he seeks, he will likely go to the lowest bidder regardless of the competence of that bidder. In addition, entry into the legal market is closely regulated by educational requirements and state licensing requirements. Thus the supply of lawyers is not necessarily responsive to changing market conditions. In the absence of fee schedules, clients will have extreme difficulty in obtaining price information, since personal advertising is and always has been prohibited by the Canons of Ethics and the Code of Professional Responsibility.

Thus unbridled competition in the legal market, rather than benefitting the public, may well lead to reduced quality of legal services. As important as those services are in our society, this cannot be tolerated. Not only do economic gains and losses hang in the balance, but the rights of individuals are at stake. Competent professionals are needed to protect and defend individual rights and peacefully resolve economic and social disputes.

The inflexible per se rule applied by the trial court would not permit these adverse effects to be considered. By contrast, a rule of reason analysis would entail exploration of the economic effects of, and policy justifications for, fee schedules within the context of the legal profession to determine rationally whether they unreasonably restrain trade. Where, as here, the effect of a per se rule would be unpredictable because of lack of experience with unfettered competition in the profession, application of the per se rule against recommended fee schedules is inappropriate.

The per se rule should not apply to the suggested fee schedules for still another reason. In *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963), this Court applied the rule of reason to a group boycott, otherwise a per se viola-

tion, since the challenged boycott occurred in the context of a federally authorized scheme of self-regulation. The Court reasoned that the normal strictures of the antitrust laws may be appropriately modified when the challenged practices are supported by "justification derived from the policy of another statute or otherwise . . . ." *Id.* at 348-49.

> "[U]nder the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act." *Id.* at 360.

A district court has applied the rule of reason to price fixing agreements used for a self-regulatory purpose under the circumstances of the investment banking business. *United States* v. *Morgan,* 118 F. Supp. 621, 687-90 (S.D.N.Y. 1953).[16]

The Fairfax fee schedule should likewise be evaluated under the rule of reason, since it embodies the policy of a state regulatory program. Presumably, the states have a rational basis for sanctioning, and in some cases compelling, minimum fee schedules within the context of the legal profession. If the doctrine of *Parker* v. *Brown* does not apply here, the rule of reason is needed to provide a smooth interface between state regulation and antitrust enforcement. Otherwise, the antitrust laws will have the practical effect of negating state regulation of the profession, regardless of the beneficial purposes and effects of that regulation. Unless a rule of reason approach is adopted, the legal profession will be forced to respond to the imperatives of profit maxi-

[16] *See also United States* v. *New York Coffee and Sugar Exch., Inc.,* 263 U.S. 611 (1924); *Prairie Farmer Publishing Co.* v. *Indiana Farmer's Guide Publishing Co.,* 88 F.2d 979 (7th Cir.), *cert. denied,* 301 U.S. 696 (1937).

mization alone. The antitrust laws should not, and do not, command such a result.

In summary, it is not necessary to jam the novel situation at issue here into conventional antitrust categories. Rather, because the case is truly one of first impression and involves inconsistencies with state regulation and professional self-regulation, this Court should avoid a simplistic, mechanical approach to the problem, as it felt bound to do in *White Motor* and *Silver.*

E.

A Decision Adverse To Fairfax Should Be Applied Only Prospectively To Avoid The Manifest Unfairness Of Subjecting Lawyers Retroactively To Unforeseeable And Unpredictable Legal Standards.

Should this Court hold that Fairfax's fee schedule violated § 1 of the Sherman Act, that decision should not be applied retroactively. Otherwise, Fairfax will be penalized for facilitating state regulation of the legal profession, obeying the ethical standards commonly held to apply to lawyers, and finally for relying on the statements of this Court and other courts that the legal profession was outside the scope of the Sherman Act. Imposing treble damages liability upon these lawyers, who at all times acted in good faith in the belief that the fee schedule was ethical and lawful, indeed, required, would be grossly unfair and manifestly unnecessary.[17]

[17] Petitioners object that Fairfax did not raise the non-retroactivity argument until after trial. That should not preclude consideration of the argument by this court. Obviously, the point was not raised during the trial because it would have been inappropriate, illogical and untimely to do so. In any event, the trial court and counsel for Petitioners had ample opportunity to consider and comment upon Fairfax's contentions made both by formal motion and explored in oral argument. Moreover, all evidence relied upon by Fairfax was introduced within the course of the trial and thus came as no surprise to Petitioners.

In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), this Court listed three separate considerations for determining whether a civil decision should be applied nonretroactively.[18] First, "the decision . . . must establish a new principle of law, *either* by overruling clear past precedent on which litigants may have relied . . ., *or* by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." Second, a court should look "to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retart its operation." Third, a court should weigh "the inequity imposed by retroactive application. . . ." 404 U.S. 106-07 (emphasis added). All of the *Chevron* criteria are met in this case.

A decision that suggested fee schedules promulgated by local bar associations are subject to the antitrust laws would establish new principles of law. This Court would then have decided "issue[s] of first impression" both by declining to follow its earlier clear statements on the subject of the learned profession, and by resolving the other issues in this case, never before tested, "whose resolution [was] not

In any event, the argument should still be carefully considered to avoid the substantial injustice that would otherwise result. *See Hormel* v. *Helvering*, 312 U.S. 552 (1941); *Dudley* v. *Inland Mutual Insurance Co.*, 299 F.2d 637 (4th Cir. 1962). Indeed, if deemed necessary to reach the correct result, an appellate court may *sua sponte* consider points not presented to the district court and not even raised on appeal by any party. *See, e.g., United States* v. *Continental Can Co.*, 378 U.S. 441, 457, 470 (1964). The importance of the present case is too great in terms of its potential devasting impact on bar associations across the country for this Court to make a determination without consideration of the nonretroactivity point.

[18] Although *Chevron* was not an antitrust decision, the Court obviously intended the criteria to be of general application to civil cases. Indeed, lower courts have subsequently relied extensively upon the *Chevron* criteria in a variety of factual contexts, including the antitrust area. *See, e.g., Bendix* v. *Balax, Inc.*, 471 F.2d 149, 155 (7th Cir. 1972), *cert. denied*, 414 U.S. 819 (1973).

clearly foreshadowed." Until this case, no court had ever faced the general question whether advisory fee schedules adopted by bar associations transgress the Sherman Act. More specifically, until this case no court had ever decided the following issues:

(1) whether a fee schedule adopted and used only by members of a county bar association meets the interstate commerce requirement of the Sherman Act;

(2) whether the doctrine of *Parker* v. *Brown* protects a fee schedule adopted by a bar association in fulfillment of valid state regulation; and

(3) whether a mere advisory fee schedule, adopted by a bar association for legitimate reasons only, constitutes price fixing violative of the Sherman Act.

As demonstrated above, there was ample precedent to the effect that the Sherman Act did not reach the learned profession at all.

Thus, since the inception of the Sherman Act, members of the legal profession have logically assumed on a number of grounds that advisory fee schedules were not unlawful under the antitrust laws. At least thirty-four states and hundreds of local bar associations have promulgated such schedules. *See, e.g.*, Stip. 26, Ad. 18. Advisory fee schedules have been contemplated and approved by the Canons of Ethics and the Code of Professional Responsibility. Numerous state court decisions have approved the use of minimum fee schedules as persuasive evidence of a reasonable fee.[19] Indeed, in these cases the judges themselves referred

[19] *See, e.g., Junker* v. *Junker*, 188 Neb. 555, 198 N.W.2d 189 (1972); *State ex rel. Baker* v. *County Court*, 29 Wis. 2d 1, 138 N.W.2d 162 (1965); *Buckles* v. *Continental Cas. Co.*, 197 Ore. 128, 252 P.2d 184 (1953); *Succession of Weil*, 205 La. 214, 17 So.2d 255 (1944); *Broughton* v. *Nance*, 244 Ala. 499, 14 So.2d 505 (1943); *Cox* v. *State Ind. Accident Comm.*, 168 Ore. 508, 123 P.2d 800 (1942).

to such schedules to help them determine the amount of attorneys' fees to award.

Moreover, the absence of any litigation whatsoever until the present suit is indicative of the prevalent view that such schedules were lawful. Clearly, then, attorneys all across the country must have believed in good faith that advisory fee schedules did not violate the antitrust laws. This fact in itself indicates that, at the very least, it was not "clearly foreshadowed" that bar associations' advisory fee schedules would some day be declared unlawful.

Indeed, attorneys had ample justification provided by this Court for believing that such schedules were wholly legitimate. As stated in the learned professional section of this brief, Supreme Court decisions in *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931), and *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427 (1932), clearly established that the term "trade," as used in the Sherman Act, does not include the "learned professions." Other cases in this Court echoed and re-echoed that theme. In the 43 years since *Atlantic Cleaners*, this Court has never changed this position. Lawyers were thus entitled to assume that they practiced a learned profession and to rely upon this fabric of Supreme Court decision.

A recent decision of this Court argues strongly for prospective decision in this case, should this Court reverse the Fourth Circuit. In *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), the defendants had relied upon a statute subsequently found to unconstitutional. Although this Court struck down the statute, it refused to apply its decision retroactively, saying:

> "That there would be constitutional attack on Act 109 was plain from the outset. But this was not a case where it could be said that appellees acted in bad faith

> or that they relied upon a plainly unlawful statute. In this case, even the clarity of hindsight is not persuasive that the constitutional resolution of Lemon I could be predicted with assurance sufficient to undermine appellees' reliance on Act 109." *Id.* at 207.

The resolution of the professional exemption question in the instant case was even less "clearly foreshadowed" than the unconstitutionality of the statute in *Lemon*. In the latter case lower courts had split on the question involved. In the instant case, however, all precedent, until very recently, supported the learned profession exemption from the antitrust laws.

Attorneys also were justified in thinking that local bar activities did not sufficiently affect interstate commerce so as to come within the Sherman Act, and that advisory schedule did not constitute price fixing. For these very reasons, in what must be an embarrassment to the Solicitor General in his *amicus* role in this case, the Justice Department had never even brought a suit challenging an advisory fee schedule until its recent action against the Oregon State Bar.

Furthermore, on two separate occasions in recent years, the Department of Justice officially sanctioned the use of advisory fee schedules in Fairfax County. In response to an inquiry from the Arlington County Bar Association, as to the predecessor of the fee schedule in issue in this case, an Assistant Attorney General of the Antitrust Division of the Department of Justice advised in 1961: "The Antitrust Division has *never* taken the position in the past that advisory minimum fee schedules established by Bar Association were subject to prosecution under the federal antitrust laws." (emphasis added). He went on to say that the Department's position was based upon the fact that local bar ac-

tivities were not " 'in commerce' " and did not appear to have a significant 'affect' [sic] upon interstate commerce," and the fact that the fee schedules "were not agreed upon as to the amounts to be charged, but were advisory only." (A. 49). In 1965, Donald F. Turner, Acting Assistant Attorney General in charge of the Antitrust Division, reiterated the Department's position that mere advisory fee schedules were not subject to antitrust challenge. (A. 54). Surely no more justifiable basis for reliance could exist than that the antitrust prosecutors sanctioned the use of advisory fee schedules, not once in recent years, but twice, and without reservation.

Lawyers further assumed that, since the Canons of Ethics, the Code of Professional Responsibility, and state regulation of professional ethics sanctioned and approved the use of minimum fee schedules, adoption of such schedules could not conceivably violate the federal antitrust laws. Certainly, a contrary result was not "clearly foreshadowed."

The second *Chevron* criterion for nonretroactive decision is also clearly satisfied in this case. The imposition of treble damages upon Fairfax would not advance the purpose of a rule declaring advisory fee schedules in violation of the Sherman Act. The obvious purpose of such a rule would be to eliminate the promulgation and use of such schedules. This purpose would be easily accomplished without the imposition of damages for a retroactive violation of the rule. Fairfax has already rescinded its schedule. Damages, of course, are imposed to deter others from violating the law as determined by courts. Surely, the imposition of civil penalties for acts considered lawful when performed is no deterrent at all. Moreover, a decision in the instant case would be directed at lawyers—men and women who

have sworn to uphold federal and state law. Unquestionably, imposition of treble damages upon Fairfax would be completely unnecessary to effect general deterrence among lawyers. Such an imposition would serve only to punish for punishment's sake, without serving any remedial purpose.

Finally, in view of the prevalent, good-faith belief among lawyers that advisory fee schedules did not violate the antitrust laws, retroactive application of this decision would impose substantial inequity upon every lawyer in the United States. Retroactive application would mean that hundreds of local bar associations would be subject to potentially ruinous treble damages liability for activities thought to be perfectly legal, indeed approved by authoritative regulatory bodies. Mere membership in a bar association that had issued a fee schedule might well lead to a place on the list of defendants in a class action suit. For example, in the instant case, an award of treble damages would more than wipe out the assets of Fairfax, and if in subsequent litigation personal liability were to be extended to individual members of Fairfax, the award could conceivably destroy the livelihoods of many members.

Prospective application would avoid the gross unfairness, preserve and advance the rule Petitioners seek to establish, and constitute a rational method of establishing a revolutionary policy. If this Court is to overturn the long and well established practice of an entire profession in this case, it should not at the same time open the floodgates of ruinous litigation against every lawyer in the country. Prospective application—if lawyers' advisory fee schedules do violate the Sherman Act—is the only means in this case to serve the ends of justice.

VI.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed as clearly correct and based upon sound principles of law and policy.

Respectfully submitted,

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January 31, 1975

ADDENDUM

CONTENTS

This Addendum includes (1) the Findings of Fact proposed by Fairfax and adopted by the District Court below, and (2) those Stipulations of the Parties most pertinent to the argument in this Brief. Other Findings of Fact adopted by the District Court, including those proposed by Petitioners and the Virginia State Bar, and the complete Stipulations of the Parties are reproduced in the Appendix to the Petition for a Writ of Certiorari filed in this appeal on August 5, 1974.

PROPOSED FINDINGS OF FACT BY THE DEFENDANT FAIRFAX BAR ASSOCIATION ADOPTED BY THE COURT

(6) The Canons of Ethics and the Code of Professional Responsibility promulgated by the Supreme Court of Virginia contemplate and approve suggested or advisory fee schedules. (See Canon 12 and Rules for Integration of the Virginia State Bar, Part 6 II EC 2-18, DR2-106.)

(9) Under the Canons of Ethics and the Code of Professional Responsibility, as promulgated by the Supreme Court of Virginia and the American Bar Association, it is unethical conduct for an attorney either to fix legal fees based solely on the recommended fees contained in an advisory minimum fee schedule without regard to other relevant factors, or, for the purpose of soliciting business, consistently to charge fees below the recommended fees. Neither the Virginia State Bar nor any of its district committees has ever received any complaint regarding either type of unethical conduct. Neither has the Virginia State Bar nor any of its district committees ever initiated or participated in any administrative or judicial action against an attorney for having engaged in either type of unethical conduct described above. (Trial Testimony) (See American Bar Association Formal Opinion 20, dated May 5, 1930; American Bar Association Formal Opinion 171, dated July 23, 1937; American Bar Association Formal Opinion 323, dated August 9, 1970.)

(10) The Virginia State Bar is authorized by the Supreme Court of Virginia to render advisory opinions on any question of contemplated professional conduct. Pursuant to this authority, the Virginia State Bar issued Opinions 98 and 170 which affirm the propriety of advisory or suggested fee schedules. (See Stipulation of Facts and Opinions 98 and 170.)

(11) In 1969 and on previous occasions, the Virginia State Bar has published Minimum Fee Schedule Reports setting forth and analyzing the existing fee schedules promulgated by various local bar associations in Virginia. (Trial Testimony)

(12) The following statement appeared on page 3 of the Minimum Fee Schedule Report published in 1969 by the Virginia State Bar:

> "The recommended minimum fee figures in the committee's report represent the consensus recommendation of members of the committee as to fees which should be assessed in 1969 for the legal services indicated."

Further, on page 11 of the Minimum Fee Schedule Report published by the Virginia State Bar in 1969, it is recommended that the fee for title examination be one percent of the first $50,000 of the loan amount or purchase price and one half of one percent of the loan amount or purchase price from $50,000 to $250,000. These provisions are essentially identical to the advisory information contained in the Minimum Fee Schedule promulgated by the Fairfax Bar Association.

(13) The Canons of Ethics and the Code of Professional Responsibility promulgated by the Supreme Court of Virginia state that, in determining charges for title examination and certification, it is proper to consider a minimum fee schedule or the fee customarily charged in the community for such services.

Canon 12

> "In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those

> which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.
>
> "In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.
>
> "In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.
>
> "In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

Code of Professional Responsibility
EC 2-18

"The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family."

DR 2-106

(A) A lawyer shall not enter an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required , the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other emloyment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(18) Numerous attorneys who are members of the Fairfax Bar Association have charged fees for title examination different from those suggested in the Minimum Fee Schedule. (Trial Testimony)

(20) Defendant Fairfax Bar Association has never investigated, communicated with or imposed sanctions upon any member or any other licensed attorney for failing to adhere to any minimum fee schedule. Further, defendant Fairfax Bar Association has never induced or attempted to induce any other person or organization to investigate, communicate with or impose sanctions upon any member of Fairfax Bar Association or any other licensed attorney for failure to adhere to any minimum fee schedule. (Trial Testimony)

(21) Attorneys who have handled many of the real estate closings in Reston, Virginia have not rigidly adhered to the Minimum Fee Schedule promulgated by the Fairfax Bar Association. (Trial Testimony)

(24) Mr. and Mrs. Goldfarb were residing within the Commonwealth of Virginia at the time they contracted to

purchase their home in Reston, Virginia. (Trial Testimony)

(25) Both the builder who constructed the home in Reston, Virginia purchased by Mr. and Mrs. Goldfarb and the real estate agent through whom they purchased are and were located in Reston, Virginia. (Trial Testimony)

(28) All of the acts performed by A. Burke Hertz in connection with the examination and certification of the title of the land in Reston, Virginia purchased by Mr. and Mrs. Goldfarb were performed within the Commonwealth of Virginia. (Trial Testimony)

(29) All transactions relating to the purchase by Mr. and Mrs. Goldfarb of their home in Reston, Virginia, including the negotiation for sale, contract of sale, title examination, securing of mortgage loan, settlement and all legal services, occurred within the Commonwealth of Virginia. (Trial Testimony)

(33) The purpose of a title examination and certification is to assure the purchaser of real estate that the land he is purchasing will not be subject to future claims as a result of past actions by prior owners. A title examination and certification assures the purchaser of real estate the free and unemcumbered use and enjoyment of his land. (Trial Testimony)

(34) The duties and responsibilities of an attorney in connection with a residential real estate transfer in Reston, Virginia include the following:

(a) Initial telephone conversations and correspondence concerning general procedures and costs.

(b) Reading contract and any correspondence associated with it.

(c) Opening file and cross indexing under seller, purchaser, lender and property.

(d) Checking on past surveyor for possible recertification.

(e) Ordering house location survey.

(f) Checking on possible reissue rates on existing title insurance policies.

(g) Examination of title (more fully described in Findings Nos. 35 and 37 *infra.*).

(h) Writing for pay-off figures and determining existing trust holders.

(i) Preparation of application for title insurance binder.

(j) Transmitting application to title insurance company.

(k) Forwarding title binder to lender.

(l) Miscellaneous telephone calls relating to fire insurance, title insurance, closing costs, payment of taxes, getting termite certification, closing procedures and order, etc.

(m) Coordination of settlement date and time with lender, agent, seller, purchaser, other attorneys.

(n) Quoting verbal closing costs to seller, purchaser, agent and lender.

(o) Preparation of settlement documents—deed, note, deed of trust, settlement statements, transmittal letters.

(p) Computing settlement statements.

(q) Fulfilling all conditions of sales contract.

(r) Completing truth in lending form and other forms required by lender.

(s) Preparation of disbursement statement.

(t) Attorney review title and file for settlement. (More fully described in Findings Nos. 35 and 37 *infra.*)

(u) Submitting documents to lender, purchaser, or another attorney for review prior to settlement.

(v) Conducting settlement(s).

(w) Sending all required papers to lender.

(x) Depositing funds.

(y) Preparation of documents for recording, including notarizing, blue-backing, initialing. (More fully described in Findings Nos. 35 and 37 *infra.*)

(z) Bring-down title. (More fully described in Findings Nos. 35 and 37 *infra.*)

(aa) Recording papers.

(bb) Writing disbursement checks.

(cc) Forwarding disbursement checks.

(dd) Preparation of Deeds of Release.

(ee) Preparation of notes for marginal release.

(ff) Releasing notes on margin of land records.

(gg) Sending Deeds of Release to Trustees.

(hh) Recording Releases.

(ii) Conforming file copies of settlement documents with recording information.

(jj) Preparation of final title insurance policy application.

(kk) Preparation of Certificates of Title.

(ll) Forwarding final title insurance applications, then policies, all recorded documents to proper parties.

(mm) Final review of file for closing.

(nn) Closing and filing of file.

(35) In the course of examining and certifying a title to real estate, an attorney in Virginia must perform at least the following steps:

(A) A search of the grantor and grantee indices for at least a sixty year period. Each index covers approximately a ten year period. Therefore, to perform a sixty year search, six to eight indices must be thoroughly examined. In Fairfax County, a search of the "land book" is also required in order to ascertain the assessed value to the landowner as of January 1.

(B) After a chain of owners is established from a search of the grantor and grantee indices for sixty years, a complete check must be made for each of these owners (known as "abstracting the title chain") on all deeds, deeds of trust, deeds of release, homestead deeds, mortgages, powers of attorney, leases, notices of *lis pendens,* mechanics' liens, chancery suits to enforce mechanics' liens, etc. All of these items might be recorded in several deed books or in a single deed book, depending upon the jurisdiction. In Fairfax County there are separate deed books for the aforementioned items.

In making a complete check of all the owners in the chain of title, care must be taken to note for each owner the type of deed, its date, the date of recording, the consideration involved, the complete description of the land, the easements, rights of way, restrictive covenance an other impediments to the free and unencumbered use of the land and whether legal requirements for signature and notarization were met in all cases. Any suggestion of a possible interference with

the free and unencumbered use of the land by the new purchaser must be noted on the abstract and evaluated by the attorney.

If the parcel of land in question derives from a larger tract of land, a plat of the original land with all its divisions must be drawn or obtained by the attorney. This task may involve converting a "metes and bounds" description usually written in terms of rods, chains, degrees, perches, acres or other measurements, into feet or to a subdivision reference of lot, block and section.

In the event that a former owner in the chain of title was one who transferred a great deal of property, each deed from that owner must be located and read to determine whether the specific property involved in the current sale was, in fact, included in an earlier deed. Where similar names occur or names have been changed, as when women marry, this might well involve reading a very large number of deeds.

(C) Often, estates and inheritances of the property appear in the chain of title. In this event, the Will Index and docket records must be checked to determine whether any flaws existed in property transfers of this sort.

(D) In all cases it is necessary to check the Judgment Lien Indices in order to discover whether any judgments are outstanding against the property. In Fairfax County, there are four sets of indices of judgments to be searched. The indexed judgments must then be checked against the judgment lien docket to determine whether the judgments indexed have been satisfied. For Reston, that must be done daily for numerous subsidiary corporations of Gulf Reston, Inc., all of which hold title to property in Reston.

(E) In Fairfax it is also necessary to check the index of financing statements on household fixtures in order to determine whether unsatisfied financing statements exist. In Fairfax County, this entails checking two sets of indices.

(F) In the event subdivision plans are involved, plat or map books must be consulted for subdivision plans not recorded in deed books. Plat books should also be checked for easements and building restrictions on the property.

(G) Oftentimes, corporate owners appear in the chain of title. In this event, questions of corporate law may arise. For example, if the sale of land included all or substantially all of the assets of the corporation which were not sold in the regular course of business, then stockholders' consent to the sale must be located and verified. In addition, in some cases, verification of the name of the officers who executed a corporate deed must be obtained from the State Corporation Commission and a check should also be made to determine whether the corporate grantor is still in existence.

(H) In all cases, federal, state, county and town or city tax records must be checked to establish whether any unpaid taxes exist as a possible lien against the property. There are several sources for this information. First, a check must be made with the Treasurer or Commissioner of Revenue to obtain information on local real estate taxes. Attorneys must be particularly careful in this area as real estate taxes in Fairfax County are payable twice a year and reassessments are frequent.

In the event that a former owner in the chain of title is an estate, the executor of an estate should personally give an affidavit to the effect that all federal estate and gift taxes and Virginia inheritnce taxes are paid or nonassessable.

(I) The possible bankruptcy of any former owner in the chain of title should be checked. This information may be found in the grantor index under the name of the bankrupt

former owner. However, this information need not be recorded there and it is also necessary to check the Federal District Court records.

(J) In addition to all of the foregoing, it is sometimes necessary to check additional records such as alimony and child support decrees, special commissioner deeds, and judicial sale records.

Once all of the foregoing steps are completed, an attorney must review his findings and evaluate all possible defects noted in the chain of title. (Trial Testimony.)

(36) While a title examination in Reston generally involves the steps outlined in Finding No. 35, factors peculiar to the Reston property further complicate the procedure. These factors include:

(a) Complex financing and transfer arrangements involved in the original transaction creating Reston, including a conveyance with a leaseback and both an option and an obligation to repurchase.

(b) The existence of numerous corporate subsidiaries of Gulf Reston, Inc. set up, in part, for the purpose of holding title to various parcels in Reston.

(c) The very large number of real estate transactions occurring in Reston on a daily and weekly basis. (Trial Testimony.)

(37) Because of the peculiar nature of Reston, the following specific steps are often followed on a daily basis in connection with the examination and certification of a title to property in Reston.

(a) The grantor and grantee indices must be checked daily and all entries added to the grantor and grantee conveyance list for Gulf Reston, Inc., John Hancock Mutual

Life Insurance Company, Belwood, Inc., Bonres, Inc., Bonner Reston Associates, Pignolia, Inc., the Ryland Group, Inc. and Teeshot, Inc., and this must also be done for several other corporations at less frequent intervals. This same procedure must also be followed for all unindexed instruments.

(b) After obtaining deed book and page references, the recorded instrument is examined and either abstracted or conformed or copies made. If these are extremely lengthy orders, copies are obtained from the Clerk's office at the cost of $1.00 per page.

(c) When rights of way and easements, etc. are recorded referring to the original 6,000 plus acres comprising Reston, it is necessary to determine which of the original acreage parcels is affected. Then it is necessary to determine whether the property is presently subdivided and dedicated as a section including the many resubdivisions. This will provide an up to date record of which easements and rights of way affect any area or property in Reston.

(d) Instruments such as Gulf repurchase deeds and plats, subdivisions, easement agreements, etc. are reviewed for recording. Also a comparison is made of the metes and bounds description with courses and distances on the plat to ascertain that there are no discrepancies between the two.

(e) Unrecorded instruments furnished by Gulf Reston, Inc., Vepco, C & P Telephone, Reston Transmission, etc. are checked as to each parcel or lot being examined.

(f) Each subdivision section is broken down into blocks and block lists (as to lot) and checked against grantor list to see that the duplicate lot numbers are not recorded. If errors are found, attorney who recorded the erroneous description is notified and asked to correct same.

(g) Answer any questions as to recording data, etc. requested by Reston Engineering Department.

(h) When recording deeds and deeds of trust in the individual owner after closing, the grantor list is checked again, judgments in four different sets of judgment records are checked again and unindexed instruments in as many as four different places are also rechecked. Next, it is usually necessary to wait in line to record. Once this is accomplished, it is necessary to conform copies as to instrument number, time of recording and deed book and page numbers.

If judgment such as Internal Revenue Service, maintenance and support, etc. or any other problems are discovered, the responsible attorney must consider and determine whether the instrument can be recorded or whether the problem must first be resolved. The Gulf Reston, Inc., Palindrone Corporation and Reston, Va., Inc. lists must be checked and rechecked on every piece or parcel of property being examined up to the minute of recording as they reserve the right to grant subsequent rights of way. This also applies to each resale from one individual to another. Similarly, the Gulf Reston, Inc. record must always be rundown as though they were still the owner.

For each plat, including all notations of any type, rights of way, resubdivisions, easement agreements, etc. must be checked as to each lot or parcel.

(i) It may be necessary to conform copies in various "section files" and update title front sheets in subdivision and individual lot files.

(j) The recording deeds of dedication, resubdivisions, etc. is time consuming as it is necessary to go to the Massey Building (County Office Building in Fairfax) to accomplish the following:

(1) Each dedication must be approved by the county attorney's office on the 11th floor;

(2) Pick up the approved plat from the 7th floor;

(3) Pay any unpaid fees—7th floor;

(4) Return to the Clerk's office at the courthouse, check wach list and entry thereon;

(5) Check all the unindexed instruments, frequently as many as 50 to 80 in number;

(6) Wait in line to record and then record;

(7) Obtain recorder's receipt and fill in time, instrument number, etc., and then conform copies;

(8) Wait for the deed book and page numbers, frequently for as long as an hour or more. (Trial Testimony.)

(38) In certifying a title to real property, an attorney becomes the person ultimately liable in the event a defect is subsequently discovered. This is true even if the purchaser of the real estate secures title insurance for, in that event, the attorney's certification is to the title insurance company. If the attorney has made an error in examining or evaluating the title, the purchaser of the real estate is protected by his insurance company which, in turn, is entitled to proceed against the attorney for any error in the certification. Accordingly, the attorney bears the ultimate responsibility, ethically and financially, for the examination and certification of a title in any transfer of real property. Furthermore, the liability of the attorney is not limited by the purchase price of the property, but increases over the years as the value of the property increases, either through inflation or appreciation. (Trial Testimony.)

(49) Defendant Faifax Bar Association does not examine

and certify titles to real property or provide legal services of any kind. (Trial Testimony.)

(54) There is no evidence that the promulgation of an advisory minimum fee schedule by the Fairfax Bar Association has affected prices adversely to consumers. (Trial Testimony.)

* * *

STIPULATIONS OF THE PARTIES

* * *

3. The contract price of the Reston home was $54,500, to be financed by a deposit with the contract of $2,000, a down payment of $37,500 and a $15,000 loan from the Northern Virginia Savings and Loan Association, 5350 Lee Highway, Arlington, Virginia, secured by a first trust on the property. Plaintiffs purchased title insurance, which covered the interest of the mortgagee and their own interests in the property, and obtained the services of an attorney licensed to practice law in the State of Virginia for the purpose of concluding the legal aspects of the purchase, including particularly examination and certification of the state of the title to the property to be acquired.

4. The contract provided that the closing on their home would take place at the offices of A. Burke Hertz, an attorney licensed to practice law in the State of Virginia, who maintains offices at 210 Little Falls Street, Falls Church, Virginia, which is in the county of Fairfax.

* * *

9. The State Bar is an administrative agency of the Supreme Court of Virginia created by the Supreme Court of Virginia pursuant to the laws of Virginia, including Section 54-49 of the Code. The Supreme Court of Virginia has promulgated rules and regulations governing the conduct

of attorneys and the operations of the State Bar which are found in Sections II and IV of Part VI of the Rules of the Supreme Court.

10. The powers of the State Bar have been delegated to the Council of the State Bar, which is comprised of one person from each Judicial Circuit in Virginia, six persons appointed at large by the Supreme Court of Virginia, and the President, President-Elect and immediate Past President, all of whom serve as *ex officio* members.

11. Each attorney practicing law in Virginia is required by statute and by court rule to be a member of the State Bar. The State Bar is required by statute and rule to investigate alleged violations of the standards of conduct mandated by the Supreme Court Rules, and to report its findings to a court of appropriate jurisdiction for further disciplinary proceedings.

* * *

14. In 1962 and 1969 attorneys who were members of the State Bar prepared on behalf of the State Bar Minimum Fee Schedule Reports, copies of which are annexed hereto as Exhibits 26 and 27.

15. Exhibits 26 and 27 became the basis for the minimum fee schedules published by the Local Bar Associations in 1962 and 1969 . . . .

* * *

17. The State Bar has been given authority to issue opinions on matters which the Supreme Court of Virginia says involve questions of ethics.

18. The Supreme Court of Virginia has stated that suggested fee schedules and economic reports of the State Bar and of Local Bar Associations involve questions of ethics within the meaning of paragraph 17.

19. The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on questions of ethics such as Opinions 98 and 170 which relate to minimum fee schedules and to disseminate minimum fee schedule reports, such as Exhibits 26 and 27. Copies of Opinions 98 and 170 are annexed hereto as Exhibits 30 and 31.

* * *

22. The Supreme Court has delegated to the State Bar responsibility for investigating complaints of unprofessional conduct of any member of the State Bar. Such investigations are carried out by district committees which are comprised of attorneys. There is such a committee organized in each of the ten congressional districts of Virginia.

23. Virginia attorneys who provide legal services to prospective home buyers in Reston, Virginia are specifically prohibited by the Code of Professional Responsibility promulgated by the Supreme Court of Virginia from advertising their services or their charges for these services either within or without the State of Virginia.

24. The State Bar has never received a communication from a Local Bar Association regarding the professional conduct of any member of said Associations or of the State Bar, including failure of such members to follow a minimum fee schedule.

25. The State Bar has never initiated or participated in any administrative or judicial action against an attorney for failure to adhere to a minimum fee schedule.

26. Minimum fee schedules of some type are published and circulated in at least 34 states and in the District of Columbia either by the voluntary bar or by the counterpart of the State Bar.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF
RESTON, VIRGINIA HOMEOWNERS,
Petitioners,

v.

VIRGINIA STATE BAR AND
FAIRFAX COUNTY BAR ASSOCIATION,
Respondents.

BRIEF ON BEHALF OF RESPONDENT VIRGINIA STATE BAR

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v.

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BRIEF ON BEHALF OF RESPONDENT VIRGINIA STATE BAR

QUESTIONS PRESENTED[1]

1. **Whether The Action Of The Virginia State Bar, An Administrative Agency Of The Supreme Court Of Virginia, In Distributing Minimum Fee Reports And In Issuing Opinions With Respect To Ethical Conduct Of Attorneys, Constitutes "State Action" Exempt From Federal Antitrust Laws?**

2. **Whether The Virginia State Bar, An Administrative Arm Of The Virginia Supreme Court, Is Immune From Suit On Account Of The Eleventh Amendment Of The United States Constitution?**

---

[1] To avoid unnecessary repetition this brief wil not address all of the questions presented although the other issues in this case apply with equal force to the State Bar. Rather, we will rely upon the arguments presented by the Respondent Fairfax Bar.

STATEMENT OF THE CASE

Respondent, Virginia State Bar, agrees substantially with the statement of the case by the Goldfarbs. To the extent that it disagrees, these matters will be addressed in argument.

Additionally, the following facts are pertinent to a consideration of the nature of the Virginia State Bar, although they are inclusive of some previously stated by petitioners.

The State Bar is an administrative agency of the Supreme Court of Virginia created by the Supreme Court of Virginia pursuant to the laws of Virginia, including § 54-49, Code of Virginia (1950), as amended. The Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operations of the State Bar which are found in §§ II and IV of Part VI of the Rules of the Supreme Court (Stip. 9; App. A, p. 17[2]).

The powers of the State Bar have been delegated to the Council of the State Bar, which is comprised of one or more[3] persons from each judicial circuit in Virginia, six persons appointed at large by the Supreme Court of Virginia and the president, president-elect and immediate past president all of whom serve as *ex officio* members (Stip 10; App. A, pp. 17-18).

Each attorney practicing law in Virginia is required by statute and by court rule to be a member of the State Bar. The State Bar is required by statute and rule to investigate alleged violations of the standards of conduct mandated by the Supreme Court Rules, and to report its findings to a

[2] References to the appendices accompanying the petition will be designated "App. ....., p. ....." References to the single Appendix will be designated "A. ....."

[3] Since the institution of this action, there has been a minor amendment of the Rules, which is not pertinent to the issues in this case.

court of appropriate jurisdiction for any disciplinary proceedings (Stip. 11; App. A, p. 18).

The Supreme Court has delegated to the State Bar responsibility for investigating complaints of unprofessional conduct of any member of the State Bar. Such investigations are carried out by district committees which are comprised of attorneys. There is such a committee organized in each of the ten congressional districts of Virginia (Stip. 22; App. A, p. 20).

Pursuant to § 54-52 of the Code, the funds for operation of the State Bar are appropriated from a special fund of the State Treasury by act of the General Assembly. The special fund in the State Treasury consists of fees paid by members of the State Bar, the amounts of which are set, pursuant to statute, by the Supreme Court (Stip. 12; App. A, p. 18). The General Assembly has established the limit of such fees (§ 54-50).

The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on matters involving questions of ethics (Stip. 16; App. A, p. 19). The Supreme Court of Virginia has stated that suggested fee schedules and economic reports of the State Bar and of local bar associations involve questions of ethics (Stip. 18; App. A, p. 19). The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on questions of ethics, such as Opinions 98 and 170, which relate to minimum fee schedules, and to disseminate minimum fee schedule reports (tip. 19; App. A, p. 19).

In promulgating Opinions 98 and 170, the Council of the State Bar stated that an attorney who ". . . *habitually* charges less than the suggested minimum fee schedule adopted by his local Bar association, raises a presumption that such lawyer is guilty of misconduct . . . ." (Emphasis in original.)

In 1962 and 1969, attorneys who were members of the State Bar prepared on behalf of the State Bar minimum fee schedule reports (Stip. 14; App. A, p. 18). At the time of the initiation of this suit minimum fee schedules of some type were published and circulated in at least thirty-four states and in the District of Columbia either by the voluntary bar or by a counterpart of the State Bar (Stip. 26; App. A, p. 20).

The State Bar has never received a communication from the respondent local bar association regarding the professional conduct of any member of said association or any member of the State Bar, including failure of such members to follow a minimum fee schedule (Stip. 24; App. A, p. 20). The State Bar has never received a communication from any person regarding the professional conduct of any member of the State Bar with respect to minimum fee schedules (A. 70). The State Bar has never initiated or participated in any administrative or judicial action against an attorney for failure to adhere to a minimum fee schedule (Stip. 25; App. A, p. 20).

Virginia attorneys who provided legal services to prospective home buyers in Reston, Virginia, are specifically prohibited by the Code of Professional Responsibility promulgated by the Supreme Court of Virginia from advertising their services or their charges for these services either within or without the State of Virginia (Stip. 23; App. A, p. 20).

SUMMARY OF ARGUMENT

1. In *Parker* v. *Brown*, 317 U.S. 341 (1943), the Court stated that the Sherman Act was not intended by Congress to restrain actions by a state or its officers or agents. While the fact that there is "State action" does not automatically confer antitrust immunity upon a person or corporation, the

State agency directing such action is immune. This is true whether the State action is directed by the legislature or the judiciary.

2. The Code of Virginia authorizes the Supreme Court of Virginia to organize the Virginia State Bar as the administrative agency of the Court for the purpose of investigating and reporting violations of the Court's rules. The Code further authorizes the Court to adopt rules prescribing a code of ethics. Even apart from the statutory authorization, the Court would have the inherent power to regulate the practice of law. The Supreme Court of Virginia pursuant to statutory and inherent authority adopted the Code of Professional Responsibility. The Code provides that an attorney shall not charge an excessive fee and that in the determination of his fee he should consider, *inter alia*, suggested fee schedules.

The Virginia State Bar has taken two actions which form the basis for the complaint here. First, it has promulgated two opinions which essentially hold that the *habitual* charging of less than the suggested minimum fee raises a presumption that a lawyer is guilty of misconduct. Second, suggested minimum fee reports were circulated in 1962 and 1969, which could be used as the basis for local minimum fee schedules. In both these actions the Bar was carrying out its legal duties.

In the rendering of opinions as to ethical conduct the Bar was fulfilling its legal responsibilities. Further, in circulating suggested minimum fee reports the Bar was providing attorneys with the guidance necessary to aid them in avoiding a violation of the Code of Professional Responsibility. While the State Bar may conceivably have some private functions, the actions taken here are clearly governmental.

Minimum fee schedules have an important role in the application of the Code of Professional Responsibility. A high fee obviously harms the client; a low fee may do so as well. If an attorney's fee is lower than that which permits him to earn an adequate income, he is likely to cut his costs by failing to maintain an adequate library or continue his legal education. Further, this is a method of solicitation which has been universally condemned throughout the history of the regulation of the practice of law.

3. The Virginia State Bar enjoys the sovereign immunity of the Commonwealth of Virginia. The Court has held on numerous occasions that a waiver of sovereign immunity will be found only where explicitly stated by Congress. All the evidence is to the contrary with respect to the reach of the Sherman Act to the actions of a State agency.

For the reasons previously stated, the State Bar is manifestly a State agency for the purposes of the actions which are complained of here. In rendering opinions as to ethics and circulating suggested minimum fee reports, the State Bar is the *alter ego* of the Supreme Court of Virginia.

That the Virginia State Bar is a State agency is not a position conveniently adopted for the purposes of this law suit. As far back as 1944, the Attorney General ruled that the Virginia State Bar was an agency of the Commonwealth. Further, the Attorney General is permitted to represent only State agencies or officers, not private individuals or entities.

The argument of the United States that the funds of State Bar are not State funds manifests a lack of knowledge as to State financing. The State Bar is only one of many agencies who receive their funds other than by general appropriation. The expenditures of such special funds are regulated by State law and are no less "State funds."

ARGUMENT

I.

The Actions Of The Virginia State Bar In Publishing Minimum Fee Reports And Circumscribing Conduct Of Attorneys With Regard To Adherence To Local Minimum Fee Schedules By Means Of Ethical Opinions Constitute "State Action" Exempt From Federal Antitrust Laws.

A.

PARKER V. BROWN

The seminal case with respect to "state action" is *Parker* v. *Brown,* 317 U.S. 341 (1943). The case involved an interpretation of the applicability of the Sherman Act to the actions of a State agency. The following language is instructive:

"We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-351.

* * *

"There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.' " 317 U.S. at 351.

* * *

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." (Citation omitted.) 317 U.S. at 352.

As far back as 1895, it was ruled that a state was not a "person" within the meaning of the Sherman Act. *Lowenstein* v. *Evans,* 69 F. 908 (C.C.D.S.C. 1895). The Court subsequent to *Parker* had another opportunity to consider the "state action" exemption to the Sherman Act. In *Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), it was held that efforts to restrain trade by obtaining passage of laws was "state action" within the meaning of *Parker.* Therein the Court stated:

> ". . . [T]he Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where restraint upon trade or monopolization is a result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U.S. at 135-136.

Finally, the Court has held in *United Mine Workers of America* v. *Pennington,* 381 U.S. 657 (1965), that the *Noerr* concept extended to the actions of a labor union and certain large coal producers in attempting to influence the Secretary of Labor to set a minimum wage in the industry so high as to drive out small producers. The common thread weaving its way through *Parker, Noerr* and *Pennington* is that the State cannot be held responsible for violation of the Sherman Act.

Typically, the cases in which the *Parker* defense has been asserted, have been suits by competitors against businesses regulated by the State in some manner, *e.g., Washington Gas Light Co.* v. *Virginia Electric and Power Co.,* 438 F.2d 248 (4th Cir. 1971); *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.,* 394 F.2d 672 (5th Cir. 1968) *cert. denied,* 393 U.S. 1000 (1968), or against businesses which have attempted to have governmental action taken which would restrain trade in some manner, *e.g. Noerr, supra; George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.,* 424 F.2d 25 (1st Cir. 1970), *cert. denied,* 400 U.S. 850 (1970).

In the former cases the issue has usually been whether there was sufficient regulation or in fact whether there was a governmental agency involved, *e.g. Asheville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission,* 263 F.2d 502 (4th Cir. 1959). In those cases where insufficient regulation was found, the immunity of the state was found not to be conferred upon the private businesses acting under the state's direction.

In the latter cases, *i.e.* where the government is often a party to the action complained of, if not to the suit, the courts have almost without exception found, not only that the government was immune, but that its immunity extended to the private parties, *see e.g. Okefenokee Rural Electric Municipal Corp.* v. *Florida Power and Light Co.,* 214 F.2d 413 (5th Cir. 1954); *United Mine Workers of America* v. *Pennington, supra.* This is true even where the government is an active party in the conspiracy, *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52 (1st Cir. 1966), or where the governmental agent acted outside of his authority. *Parmalee Transportation Co.* v. *Keeshen,* 292 F.2d 794 (7th Cir. 1961); cf. *Harman* v. *Valley Nat'l. Bank,* 339 F.2d 546 (9th Cir. 1964).

Only two cases have been found which even arguably support the position that a state can be liable under the Sherman Act. In *Hecht* v. *Pro-Football, Inc.,* 444 F.2d 931 (1971), *cert. denied,* 404 U.S. 1047 (1972), the Court of Appeals for the District of Columbia held that Congress in enacting the District of Columbia Stadium Act did not

intend to provide an exception to antitrust laws. Although the case involved only an interpretation of two federal statutes, the language of the opinion would suggest that a similar analysis might be applied to a State agency. Little can be gleaned as to the financial or governmental structure of the D. C. Armory Board so as to provide a comparison with the State Bar. Further, the opinion was specifically rejected by the Court of Appeals for the Ninth Circuit in *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974).

The second case is *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011 (3rd Cir. 1971), wherein a declaratory judgment and injunctive relief were sought that the Virgin Islands Fair Trade law violated the Sherman Act. There is nothing to indicate what, if any, defenses were raised by the Virgin Islands administering Board. In fact, the Board did not even join in the appeal from the District Court. This case is a slender reed upon which to base the argument that a state or one of its agencies can violate the Sherman Act since it is unknown if the issue was even raised.

As to any arguable distinctions between legislative and judicial authority, District Judge Bryan's opinion is responsive:

> "The rationale behind the holding of *Parker* v. *Brown, supra,* that the Sherman Act restrains only actions of private persons and not state action, applies equally to both a state's judicial actions and its legislative actions. Whatever force or efficacy the Virginia State Bar had in rendering opinions and supplying the enforcement machinery for violations of ethical conduct is derived from the judicial and 'legislative command of the State and was not intended to operate or become effective without that command.'" (App. A, p. 6).

B.

THE VIRGINIA STATE BAR

The actions of the Virginia State Bar with respect to the subject matter of this suit do not fall neatly into the categories of any of the previous cases. It does not serve the function of a corporation commission in setting rates; and yet, it clearly has the power to regulate the legal fees to be charged through the rendering of ethical opinions, a duty imposed by statute. At the same time it is not acting as a party to any unlawful agreement or combination. While it published fee reports, this is clearly a very incidental part of the action complained of in that they are not binding, but are mere guidelines for localities and in fact, were not adopted in their entirety by the Fairfax County Bar Association, even as to the title examination fees.[4] It is further significant that in rendering the opinions complained of and in publishing the minimum fee reports, the State Bar is carrying out its statutory responsibility; it is not acting in a commercial or proprietary capacity.

The conduct of this defendant which was alleged to have contributed to the "conspiracy" in restraint of trade, is with respect to its role in enforcement of the Code of Professional Responsibility as promulgated by the Supreme

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[4] A comparison of page 11 of the Virginia State Bar minimum fee schedule report of 1969 (Exh. 27; A. 26) with page 25 of the Fairfax Bar Association minimum fee schedule of 1969 (Exh. 29; A. 34) reveals (a) that there is a minimum title examination fee of $100 under the Fairfax schedule while there is a minimum fee for title examination of $75 under the State Bar report, (b) the Fairfax report provides for a fee of one-half of one percent of the amount of loan or purchase price, whichever is greater, from $50,000 to $100,000 and one quarter of one percent of the loan amount or purchase price, whichever is greater, from $100,000 to $1,000,000, while the State Bar report provides for a fee of one-half of one percent of the loan amount or purchase price from $50,000 to $250,000 with any amount over $250,000 of loan amount or purchase price to be reached by negotiation or agreement.

Court of Virginia. This role in fact is restricted to investigating complaints and reporting violations of the rules of ethicsc of the Court to courts of competent jurisdiction for disciplinary action. Section 54-49 of the Code of Virginia (1950), as amended, provides:

> "The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof and in good standing."

It is significant that the State Bar has no authority to impose any sanctions on any attorney who violates such rules and regulations. Rather, it must seek action in the courts (See §§ 54-51, 54-74).

The Supreme Court of Virginia has been given authority by the General Assembly to prescribe a code of ethics and disciplinary procedures with respect to the practice of law. Section 54-48 of the Code of Virginia (1950), as amended, reads as follows:

> "The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:
>
> "(a) Defining the practice of law.
>
> "(b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics.

> "(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law."

Irrespective of statute, the Supreme Court enjoys the inherent power to regulate the practice of law. *Button* v. *Day,* 204 Va. 547, 132 S.E.2d 292 (1960). The activity complained of, then, is action by the Supreme Court of Virginia through its "administrative agency" (see § 54-49), the Virginia State Bar.

In 1970, the Supreme Court of Virginia amended its rules by substituting a new Code of Professional Responsibility for the 47 Canons of Professional Ethics, 211 Va. 295. EC 2-18 reads in relevant part as follows:

> "The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. *Suggested fee schedules* and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees."[5] (Emphasis supplied.)

In promulgating DR 2-106(A) the Supreme Court of Virginia prohibited an attorney from charging a "clearly excessive fee." Further, in promulgating DR 2-106(B)(3) the Supreme Court established "the fee customarily charged in the locality for similar legal services" as one of the criteria by which the reasonableness of a fee may be determined. Clearly, the State Bar has the right, if not the *duty,* to provide attorneys with some guidelines by which reasonableness of fees can be judged. The minimum fee reports circulated in 1962 and 1969 serve such a purpose.

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[5] Canon 12 of the Canons of Professional Ethics specifically provided for the use of minimum fee schedules in determining the customary charges for legal services. 171 Va. xvii, xxiii.

The United States argues (Brief, p. 45) that the State Bar acted in a "private" capacity when it circulated suggested minimum fee schedule reports and also when it determined through Opinions 98 and 170, that habitual failure to adhere to such schedules raised a presumption of unethical conduct. In view of the fact that suggested fee schedules are specifically referred to in ethical rules adopted by the Supreme Court of Virginia and further in view of the fact that the State Bar is required by law to render opinions on ethical conduct, such assertion is invalid. Conceivably, the State Bar is wrong in stating that habitual failure to follow minimum fee schedules raises a presumption of unethical conduct. Most assuredly, however, it acts in a governmental capacity in so doing. The United States apparently takes the position that because an action of the State Bar may benefit the private interests of an attorney, such action is necessarily nongovernmental. Were this true, all unauthorized practice of law opinions would be private rather than governmental actions. Manifestly, any decision that conduct by a layman is the unauthorized practice of law benefits a private attorney.

Petitioners' arguments (Brief, p. 66) that the State Bar is an administrative agency of the Supreme Court for only "limited" purposes is unpersuasive for the same reason. Even if the Bar is a State agency for only limited purposes, it has manifestly acted in such a capacity in rendering opinions as to ethical conduct and in circulating suggested minimum fee schedules for the guidance of attorneys to enable them to comply with EC 2-18. The fact that private interests may be incidentally benefitted thereby does not detract from the governmental nature of the action.

Pursuant to § 54-48 of the Code, the Supreme Court of Virginia is authorized to adopt rules defining the practice of law and to adopt a code of ethics. It has delegated to the

State Bar the administration of these duties. The legislature of Virginia has, therefore, "directed" the activities forming the basis for this complaint.

C.

THE RELATIONSHIP BETWEEN MINIMUM FEE SCHEDULES AND ETHICS

The State Bar called as a witness in the trial of this case and qualified as an expert John D. Conner, who had served as chairman of the Committee on Economics of the Law Practice of the American Bar Association (A. 72). He testified as to his knowledge of the value of minimum fee schedules, knowledge acquired from many years in bar association activities.

Mr. Conner's testimony was from the point of view of the American Bar Association and the rules of that Association with respect to the use of minimum fee schedules by attorneys. As stated, however, by him, such rules insofar as they are relevant to their suit are the same as those found in the Supreme Court of Virginia's Code of Professional Responsibility. A pertinent provision is EC 2-18 which, as previously stated, in discussing the reasonableness of fees provides that suggested fee schedules along with other factors may be used as a guideline to determine reasonable fees. Additionally DR 2-106, in setting out in detail the factors to be considered to determine the reasonableness of a fee provides that the "fee customarily charged in the locality" is one of the eight factors to be taken into consideration.

Mr. Conner testified that a minimum fee schedule serves a number of useful purposes. Among them is that of an informational source as to the reasonableness of fees. It is helpful, particularly, to young lawyers who have no ap-

preciation of the nature of work which they are to undertake and can use the minimum fee schedule as a guideline as to what might reasonably be expected to be the magnitude of the job involved. Secondly, even for older attorneys, it proves helpful where they are asked to undertake legal work which did not fall into their normal areas of practice. Finally, such schedule can be of assistance as one indicator to a client who wishes to ascertain whether or not the fee quoted to him is a reasonable one.

More important is the fact that minimum fee schedules are used as a tool in the application of the Code of Professional Responsibility. As previously stated, the Code provides for suggested fee schedules to be a factor in the determination of a reasonable fee. It is important to recognize that ethical principles require that the fee be neither too high nor too low. As Mr. Conner testified, if the fee is too high, then, of course the client is paying more for the services than the value of the services received. On the other hand, if the fee is too low, the client and the public may be harmed, as well. Based upon Mr. Conner's experience, he testified that in those cases where attorneys habitually charged fees lower than the customary fees or minimum fee schedules in their area, there was a significantly greater likelihood of a misappropriation of a client's funds. In addition, where an attorney's fees are not adequate to provide him with the standard of living required to practice his profession, he will normally undertake to cut his expenses in such manners as by failing to continue his legal education or perhaps failing to keep his library up to date. It is clear, then, that the client and the public have an interest in seeing that the fee is neither too high nor two low.

Another ethical aspect of minimum fee schedules is with reference to the practice of "solicitation." It is with respect

to solicitation that opinions 98 and 170 (Exhibits 30 and 31; A. 45 and A. 47) were issued. The practice of charging lower than adequate fees in order to solicit legal business has been universally condemned by professional organizations for hundreds of years. It has been deemed to be in the public interest to regulate the practice of law in such a way as to insure high professional standards of competence. It has further been deemed that such end may best be served by prohibiting the utilization of the practices of the marketplace in the legal profession. If the relief requested by the plaintiffs were granted, there would in effect be no way in which the Virginia State Bar and the Supreme Court of Virginia, which have been charged by the General Assembly of Virginia with the responsibility of insuring high ethical standards in the practice of law in the Commonwealth, could prevent solicitation by attorneys. Clearly, the logic of the petitioners' argument would go beyond minimum fee schedules to cover any type of price regulation whatsoever. It is just this type of result which, it is submitted, dictates that the Sherman Act be deemed not to surplant the regulation of the ethical conduct of attorneys. It would simply be impossible for the legal profession to render the high level of service required by its Code of Professional Responsibility and at the same time to be bound by the Sherman Act which is designed to cover the practices of the marketplace.

II.

The Virginia State Bar In The Publication Of Minimum Fee Reports And The Rendering Of Ethical Opinions Acts In A Governmental Capacity And Thereby Enjoys The Sovereign Immunity Of The Commonwealth.[6]

The Eleventh Amendment to the Constitution of the United States reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens who are subjects of any foreign state." *U.S. Const. amend. XI.*

In *Hans* v. *Louisiana,* 134 U.S. 1 (1890), it was held that in the absence of waiver, actions against a state by a fellow citizen were prohibited as well as actions by citizens of different states. An early exception to this rule was created in *Ex Parte Young,* 209 U.S. 123 (1907), wherein the Court held that immunity did not extend to action being taken pursuant to an unconstitutional statute or action taken outside of the authority of the governmental agent in question, which exception is generally known as the *ultra vires* exception. There is no allegation that the Virginia State Bar was acting pursuant to an unconstitutional statute or outside of its authority.

[6] Petitioners argue (Brief p. 24) that the issue of sovereign immunity is not before the Court because no cross-petition for certiorari was filed. This is erroneous. Even Petitioners concede that there was no ruling on the issue (*Id.* 24-25). Accordingly, no cross-petition would lie. Both lower courts (including the dissent) ruled in favor of the Bar on the statutory issues and had no need to reach the constitutional issue. *See Dandridge* v. *Williams,* 397 U.S. 471, 475 n. 6 (1970).

If this Court were to affirm the Court of Appeals, consideration of the sovereign immunity question would be unnecessary. If, however, it should reverse the decision below, it should decide this issue so as to enable the State Bar to avoid an unnecessary trial as to damages.

Additionally, a state may waive its sovereign immunity *see e.g. Parden* v. *Terminal Railway of Alabama State Docks Department,* 377 U.S. 184 (1964).[7] This Court has made clear, however, in two recent cases that any such waiver intended by Congress must be explicit. It will not be presumed to have acted silently. *See Employees of Department of Public Health and Welfare* v. *Missouri,* 411 U.S. 279 (1973); *Edelman* v. *Jordan,* 415 U.S. 651 (1974). Congress has not only failed to indicate that a state shall be deemed to have waived its sovereign immunity for purposes of the Sherman Act; but, as previously stated, as far back as 1895, it was ruled that a state was not a "person" within the meaning of the Sherman Act. The United States argues that the State Bar is not a state agency in "any relevant sense" (Brief, p. 47, n. 33). For the reasons previously stated it is submitted that the State Bar is the *alter ego* of the Supreme Court of Virginia with respect to matters delegated to it by the Court.

That the Virginia State Bar is an agency of the Commonwealth is not a position conveniently adopted for the purposes of this law suit. The Attorney General of Virginia ruled as far back as 1944, that the State Bar was a State agency. See Report of the Attorney General (1944-45), at p. 134 (App. I to Respondent's Brief). See also Report of the Attorney General (1959-60), at p. 375 (App. II to Respondent's brief).

Section 2.1-121 of the Code of Virginia (1950), as amended, requires representation by the Attorney General of *State* agencies. It does not permit the defense of private

[7] *But see, Ladue Local Lines, Inc.* v. *Bi-State Development Agency of the Missouri-Illinois Metropolitan District,* 433 F.2d 131, 135-136 (8th Cir. 1970).

individuals or entities. That the Virginia State Bar is a State agency has never been seriously questioned in Virginia.

The United States argues (Brief, p. 47) that since judgment against the State Bar would be against its own funds, there would be no judgment against the State for purposes of the Eleventh Amendment. This manifests a lack of knowledge of methods of financing government in the Commonwealth. While many State agencies receive appropriations from the State Treasury, many others are financed entirely through "special funds," *i.e.*, monies raised specifically for such agencies. Such monies are not part of the general funds, but they are no less funds of the Commonwealth since expenditures from those funds are regulated by State law. Examples of such agencies are the Virginia Department of Highways and Transportation, the Virginia Employment Commission, the Virginia Alcoholic Beverage Control Board, the Industrial Commission of Virginia—and the Virginia State Bar. Such a financing system represents simply another way of providing funds for State operations. Indeed, the Attorney General has ruled that the funds collected by the Bar are "appropriated" by the State. See Report of the Attorney General (1938-39), at p. 299 (App. III to Respondent's brief).

In sum petitioners would have the Court hold that the State Bar has violated the Sherman Act and is therefore liable in treble damages where it has rendered ethical opinions as authorized by statute and required by the Supreme Court of Virginia as the Court's administrative agency and where it has provided suggested minimum fee schedules for the guidance of attorneys to enable them to comply with the Code of Professional Responsibility adopted by the Supreme Court of Virginia. As District Judge Bryan said below:

> "Insofar as damages are concerned, it is stipulated that the Virginia State Bar is an administrative agency of the Supreme Court of Virginia. Aside from any Eleventh Amendment considerations, such an agency was surely never intended to be included among those liable for damages under 15 U.S.C. § 15." (App. A, p. 6).

CONCLUSION

For the reasons previously stated the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

VIRGINIA STATE BAR
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APPENDIX

APPENDIX I

SHERIFFS—Fees: Not To Collect Fees For Serving Papers On Behalf Of The Virginia State Bar.

December 18, 1944.

R. E. Booker, Esq., *Secretary-Treasurer,*
Virginia State Bar,
408 Law Building,
Richmond, Virginia.

My dear Mr. Booker:

I am in receipt of your letter of December 15, from which I quote as follows:

> In view of the fact that all the Sheriffs in Virginia are now on a salary basis, is it proper that the Virginia State Bar should pay a sheriff any fee for serving papers on behalf of the Virginia State Bar?
>
> "The Virginia State Bar has not had occasion to have any papers served since the sheriffs have been on a salary basis, but it appears that in the very near future it will be necessary to have papers served by sheriffs in several of the counties and cities in Virginia."

Section 1(b) of chapter 386 of the Acts of 1942 provides in effect that sheriffs shall not collect fees from the Commonwealth in connection with the performance of their duties. Therefore, the Virginia State Bar being a State agency, it should not in my opinion be required to pay fees to sheriffs for serving papers on its behalf.

Very sincerely yours,

Abram P. Staples,
Attorney General.

APPENDIX II

VIRGINIA STATE BAR—Witnesses—Fees for Mileage and Attendance. (143)

October 29, 1959

Honorable R. E. Booker
Secretary-Treasurer
Virginia State Bar

This is in reply to your letter of October 27, 1959, which reads as follows:

> "The District Committees of the Virginia State Bar conduct investigations in matters involving improper conduct of lawyers. The Rules of the Virginia State Bar, Sec. IV, Rule 13, provide that the District Committees may, through its officers or members, issue subpoenae for witnesses to appear before them. In a recent hearing before one of the District Committees, the following occurred:
>
> "1. Request was made by a witness summoned on behalf of the committee that she be reimbursed for two days' loss of earnings and her mileage in attending the hearing.
>
> "2. Counsel for accused lawyer had several witnesses summoned and mileage and attendance fee was requested on behalf of these witnesses.
>
> "I would appreciate your advising me at your first convenience what are the duties and responsibilities of the Virginia State Bar in reference to the above questions.

> "I might add that in the past the Virginia State Bar has paid mileage and witness attendance fees to persons summoned on behalf of the committee, but so far as I recall, it has never paid either the mileage or witness fees for persons summoned on behalf of the accused lawyer."

The Virginia State Bar is an agency of the Commonwealth, and the proceedings had in such cases are statutory, or under Rules promulgated pursuant to statutory authority. Title 54 of the Code does not contain any provision relating to allowances to witnesses, and I do not find any such provision in the Rules of the Supreme Court. In my opinion, the statutes pertaining to witness fees in Commonwealth cases are applicable.

With respect to question (1), I am of the opinion that such witnesses are entitled to the allowances provided for in Section 14-186 of the Code.

With respect to question (2), I am of the opinion such witnesses are entitled to the allowances provided for in Section 14-187 of the Code, which allowances, however, may not be paid out of State funds. Section 14-188 of the Code provides that the sum to which a witness is entitled shall be paid out of the (State) treasury in any case in which the attendance is for the Commonwealth, except where it is otherwise specially provided. In all other cases such allowances shall be paid by the party for whom the summons was issued.

Of course, the Virginia State Bar fund in the State treasury is the fund out of which Commonwealth witnesses in such cases would be paid.

In the event the person against whom the complaint was made should prevail, neither he nor any witness summoned on his behalf may recover such costs from the Commonwealth, due to the provisions of § 14-197 of the Code.

APPENDIX III

VIRGINIA STATE BAR—Act Creating—Appropriation.

Commonwealth Of Virginia
Office of the Attorney General
Richmond, Virginia

July 23, 1938

Senator John S. Battle
Charlottesville, Virginia

Dear Senator Battle:

This is in reply to your letter of July 15, in which you request my opinion upon the question whether or not the provisions contained in chapter 410 of the Acts of the General Assembly of 1938 constitute an appropriation, for the purposes of administering said Act, of the moneys resulting from the collection of the annual fees thereby authorized to be assessed against and collected from members of the Virginia State Bar.

The provisions of the Act, which are clearly within the scope of the title, authorize the Supreme Court of Appeals to "prescribe, adopt, promulgate and amend rules and regulations. * * * Fixing a schedule of fees to be paid by members of the Virginia State Bar for the purpose of administering this act, and providing for the collection and disbursement of such fees * * *."

It is my opinion that the provisions contained in the language quoted evidence an obvious legislative intent that the moneys received from said fees shall be disbursed and paid out in compliance with the rules and regulations adopted by the Supreme Court of Appeals pursuant to this authority conferred upon it.

The Constitution does not require the employment of any specific words or language to constitute an appropriation of moneys from the State Treasury. It is sufficient that the General Assembly by its legislative enactments indicate a plain and clear intention that moneys therein shall be paid out for a specific purpose. This test, I think, is fully met by the language contained in the Act.

It is my opinion, therefore, that this Act does appropriate the proceeds from the collection of said fees, and that same should be paid out on warrants of the State Comptroller drawn upon the State Treasurer, such warrants to be signed by such authority as may be prescribed in the rules and regulations hereafter adopted by the Supreme Court of Appeals.

Sincerely yours,

Abram P. Staples
Attorney General

Supreme Court, U. S.
FILED
JAN 14 1975
MICHAEL RODAK, JR., CLERK

No. 74-70

In the Supreme Court of the United States

OCTOBER TERM, 1974

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
PETITIONERS

v.

VIRGINIA STATE BAR AND
FAIRFAX COUNTY BAR ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
THOMAS E. KAUPER,
Assistant Attorney General,
GERALD P. NORTON,
Assistant to the Solicitor General,
HOWARD E. SHAPIRO,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
PETITIONERS
v.
VIRGINIA STATE BAR AND
FAIRFAX COUNTY BAR ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether a minimum fixed fee schedule promulgated by a county bar association is exempt from the Sherman Act's prohibition against price fixing on the ground that the restraint on competition is among the members of a "learned profession."

2. Whether interstate commerce is affected by collectively-fixed fees for attorneys' services in connection with the purchase of real estate in Northern Virginia.

3. Whether the Virginia State Bar is exempt from the Sherman Act for its role in the establishment and enforcement of minimum fee schedules, under the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341.

INTEREST OF THE UNITED STATES

Responding to evidence that prices for personal services were increasing more rapidly than the rate of inflation in the rest of the economy, more than four years ago the United States initiated a concerted program of antitrust enforcement directed at restraints of trade occurring in the "commercial" aspects of various professions (including attorneys) and other providers of personal services.[1] This program has included widely-disseminated statements of the Antitrust Division's policies, followed by litigation challenging particular anticompetitive practices of various professions. The government has challenged, as illegal *per se*, so-called "ethical" standards by professional associations of engineers, architects, accountants and realtors that prevent price competition in the charges for services by members of these professions.[2] In

[1] See, *e.g.*, McLaren, *Antitrust—The Year Past and The Year Ahead*, 1970 N.Y. State Bar Ass'n Antitrust L. Symp. 15, 23; McLaren, *Interview*, 39 Antitrust L.J. 368, 377 (1970); Hearings before the Subcommittee on Representation of Citizens Interests of the Senate Committee on the Judiciary, on Legal Fees, 93d Cong., 1st Sess., pt. I, pp. 164–185.

[2] *E.g.*, *United States* v. *Prince Georges County Bd. of Realtors*, Civ. No. 21545 (D.Md.), terminated by consent decree on December 28, 1970; *United States* v. *American Soc'y of Civil Eng'rs*, Civ. No. 72 C 1776 (S.D.N.Y.), terminated by consent decree on June 1, 1972; *United States* v. *American Institute of Architects*, Civ. No. 992–72 (D.D.C.), terminated by consent

May, 1974, the government filed a similar action challenging a bar association's minimum fee schedule.[3]

Despite the government's enforcement efforts,[4] bar association minimum fee schedules, a fairly recent development,[5] are still widespread; they have been used by as many as 34 state, and about 750 local, bar organizations[6] (Pet. App. A–20). The decision of this Court on the legality of such schedules under Section 1 of the Sherman Act will not only have great impact upon the legal profession but also is likely significantly to affect the use of such methods of fee-fixing by organizations in other professions.

decree on June 19, 1972; *United States* v. *American Institute of Certified Public Accountants, Inc.*, Civ. No. 1091–72 (D.D.C.), terminated by consent decree on July 6, 1972; *United States* v. *National Soc'y of Professional Eng'rs*, Civ. No. 2412–72 (D.D.C.), decided in the government's favor on December 19, 1974 (bar against competitive bidding). The decision is appended to this brief (App., *infra*).

[3] *United States* v. *Oregon State Bar*, No. 74–362 (D. Ore.), filed May 9, 1974. On defendant's motion for summary judgment, raising the "learned profession" and "state action" claims, discussed *infra*, pp. 21–30, 34–48, but not the "commerce" issue (see pp. 31–34, *infra*). the district court held on November 22, 1974. that neither of these exemptions applies. The decision is appended to petitioners' brief ("Pet. Br. App.").

[4] The American Bar Association, which in 1961 endorsed minimum fee schedules by concluding that the habitual charging of fees less than those established by such a schedule may be evidence of unethical conduct (Opinion No. 302, Committee on Professional Ethics and Grievances), stated in 1970 that "[m]ere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action" (Opinion No. 323, Committee on Ethics and Professional Responsibility).

[5] See Branca, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption That Doesn't Exist*, 3 U.C.L.A.—Alaska L. Rev. 207, 208 (1974).

[6] Branca, *supra*, 3 U.C.L.A.—Alaska L. Rev. at 208.

The interest of the United States in this case is underscored by the President's recent announcement of his economic program, in which he referred particularly to the need for enforcement of the antitrust laws with respect to "noncompetitive professional fee schedules and real estate settlement fees * * *." 120 Cong. Rec. H10120, H10121 (daily ed., October 8, 1974).

STATEMENT

Petitioners filed a class action against respondents, the Fairfax County Bar Association ("Association") and the Virginia State Bar ("State Bar"), alleging that the Association's adoption and use of a minimum fixed fee schedule, declared by the State Bar to be an enforceable ethical standard, constituted price fixing and restraint of trade and commerce in violation of Section 1 of the Sherman Act.

Petitioners claimed to represent a class consisting of all persons who, like petitioners, had purchased houses in Reston, Fairfax County, Virginia, during the four years preceding the filing of the complaint, and who had been charged title examination fees by attorneys as prescribed in the Association's schedule. Petitioners sought damages, a declaratory judgment and an injunction, but the district court severed the issue of damages and held a trial as to liability.

A. THE DISTRICT COURT'S FINDINGS AND DECISION

In ruling for petitioners, the district court made the following findings of fact and conclusions of law (Pet. App. A; 355 F. Supp. 491).

In the fall of 1971, petitioners, who then resided in Arlington, Virginia, contracted to purchase a house in Reston, Virginia. In searching for an attorney to represent them in the legal aspects of the transaction, petitioners were advised that they would be charged for title examination services in accordance with the minimum fee schedule of the Association.

In 1969, the Virginia State Bar Association had published a "consensus recommendation * * * as to fees which should be assessed * * * for the legal services indicated" (Pet. App. A–9). The recommended fees reflected in most cases "a general scaling up of fees" recommended in a similar schedule published by the State Bar in 1962 (A. 25; see A. 19–23). The recommendation suggested that title examination fees should be 1 percent of the first $50,000 of the loan amount or purchase price plus ½ percent of the amount between $50,000 and $250,000 (A. 26). (*Ibid.*)

Shortly after the State Bar's promulgation of the new fee schedule, the Fairfax County Bar Association (and the bar associations in Alexandria, Arlington and Loudoun Counties) adopted a virtually identical minimum fee schedule which followed the State Bar schedule with immaterial variations (A. 37–43).[1] In adopting the minimum fees outlined by the State Bar, the Association increased both flat dollar fees for various legal services (compare A. 34–36 with

[1] Originally named as defendants and co-conspirators, the Arlington County Bar Association and the Alexandria Bar Association agreed to a consent judgment requiring them to cancel their minimum fee schedules (Pet. App. A–2, n. 1).

A. 40–43) and percentage rates for services[5] over the levels established in the similar schedule adopted by the Association following the 1962 minimum fee report of the State Bar.

The Canons of Ethics in effect until 1971, and the current Code of Professional Responsibility promulgated by the Supreme Court of Virginia, both provide that, in determining charges for title examination and certification, it is proper for a lawyer to consider a suggested fee schedule. The Canons also provided, however, that "no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee" (Pet. App. A–9). Nevertheless, the State Bar has issued two opinions (Nos. 98 and 170) which, the district found, "in effect say that it is unethical habitually to charge fees below those suggested in a minimum fee schedule" (*id.* at A–5).

The district court held that minimum fee schedules constitute a form of price fixing which is indistinguishable from fixed sales prices and which is illegal *per se*. It ruled that they cannot be justified as a guide to setting charges, or to assure an adequate income for research, development and continued education, and that they are often likely to result in charges unrelated to the worth of the services performed (*id.* at A–3—A–5).

[5] For example, the 1969 schedule increased the minimum fee for a title examination from 0.75 percent to one percent for the first $20,000 of the sale price, and from 0.5 percent to one percent for the portion of the selling price between $20,000 and $50,000 (A. 34, 40).

The court concluded that the challenged activity substantially and directly affected interstate commerce because it found that: a significant portion of funds used for purchasing homes in Fairfax County came from outside the state of Virginia; almost all lenders require a new title search and title insurance; a large percentage of Fairfax County residents work outside Virginia; and significant amounts of real estate loans in the county are guaranteed by the federal Veterans Administration and Department of Housing and Urban Development (*id.* at A–4).

The court held that there was no "learned profession" exemption from the Sherman Act for professional services performed by lawyers pursuant to a minimum fee schedule. On the contrary, it concluded that "[c]ertainly, fee setting is the least 'learned' part of the profession" (*id.* at A–5).

Finally, the court held that the State Bar acts as an administrative state agency of the Supreme Court of Virginia (Va. Code Ann., Sec. 54–59 (1972 Repl. Vol.)). Since the district court found that the activities of the State Bar were state action, and that it never had disciplined attorneys for undercutting fixed minimum fee schedules, the court held that it was not liable under the antitrust laws in view of *Parker* v. *Brown*, 317 U.S. 341 (Pet. App. A–6). In contrast, because the Association is a voluntary private organization whose implementation of suggested minimum fee schedules does not depend upon action by the legislature or the Virginia Supreme Court, the court held that it is not exempt from the antitrust laws.

The court enjoined the Association from maintaining fixed fee schedules and ordered a further hearing on versed (Pet. App. B; 497 F. 2d 1).

B. THE COURT OF APPEALS DECISION

The court of appeals, Judge Craven dissenting, reversed (Pet. App. B; 497 F. 2d 1).

1. The court held that the State Bar, as an administrative agency of Virginia's Supreme Court of Appeals, fell within the governmental action exemption to the Sherman Act defined by *Parker v. Brown, supra*. The court ruled, however, that the *Parker* exemption did not extend to the Association, a voluntary non-governmental organization (Pet. App. B–12).

2. Although it found clear from the record that the minimum fee schedule and the enforcement mechanism supporting it substantially restrain competition among attorneys practicing in Fairfax County (*id.* at B–13), the court concluded, citing *Federal Baseball Club of Baltimore, Inc.* v. *National League*, 259 U.S. 200, and *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, that such collective restraints are lawful because the Sherman Act reaches only restraints of "trade or commerce," and the practice of law is a "learned profession," not trade or commerce.

3. Although the court acknowledged that the "learned profession" exemption did not apply insofar as the "fee schedule restrains those engaged in the financing and insuring of home mortgages by inflating a component part of the cost of securing housing" (Pet. App. B–15), it ruled that the schedules did

not have a direct and substantial effect upon interstate commerce. It held irrelevant the fact that Fairfax County residents work outside the state, and concluded that the adverse effects that the district court found the schedules to have on out-of-state lenders and guarantors were merely incidental to a general local activity—the practice of law—which the Association regulated (*id.* at B–15—B–18).

4. Finally, the court held that to apply the Sherman Act to minimum fixed fee schedules would amount to judicial legislation; would cast doubt upon the validity of bar admission standards, prohibitions upon advertising and other restrictions upon the practice of law; and would threaten retroactive application of a punitive statute in a manner that would create confusion in the legal profession (*id.* at B–19).

5. Judge Craven, dissenting, concluded that there is no exemption from the Sherman Act for "learned professions" (*id.* at B–23—B–24), and that the activities of the Association with respect to the fee schedule sufficiently affected commerce to be within the scope of the Sherman Act (*id.* at B–21—B–23). He would have affirmed the dismissal of the State Bar, however, on the ground that its involvement in promulgating and maintaining the fee schedules was too insubstantial to render it liable for violation of the Act (*id.* at B–21).

SUMMARY OF ARGUMENT

1. The promulgation and concerted use of minimum fee schedules by lawyers is inherently anticompetitive, a form of price fixing which, if undertaken in almost any other business, would be a *per se* viola-

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tion of Section 1 of the Sherman Act. Though cast in the form of an "ethical" standard of the legal profession, such schedules involve the most commercial aspect of law practice, are intended primarily to increase lawyers' incomes, and inevitably result in higher prices to consumers and non-use of legal services when they are needed. Accordingly, the use of such schedules is contrary to the basic purposes of the Sherman Act, and does not serve any significant nonpecuniary, ethical interest of the legal profession.

2. The court of appeals erred in concluding that the Sherman Act does not apply to competitive restraints by members of a "learned profession." Neither the language of the Act nor its history supports any such exemption, and implied exceptions to the Sherman Act are disfavored. Moreover, the application of the Sherman Act to fee fixing by lawyers does not involve any clash of statutory or public policies warranting the Court to imply such an exemption.

The court of appeals misread certain dicta in this Court's opinions concerning other issues as recognizing a "learned profession" exemption, although the Court has in later decisions expressly treated that question as still open. In any event, the decisions that originally raised the question whether "learned professions" are covered by the Sherman Act rested upon narrow views of the power of Congress to regulate "commerce" which this Court has long since rejected. If there are other reasons for such an exemption, they involve matters of legislative policy which are not for the courts, but the legislature.

3. In reversing the judgment against the Association the court of appeals also erred in holding that the challenged restraints on price competition by lawyers in Fairfax County do not affect interstate commerce. Here, too, the court applied an outdated conception of the commerce power, since the Sherman Act extends to the full reach of Congress' power to regulate commerce. The record in this case established a sufficiently substantial impact on interstate commerce to bring the challenged price-fixing within the scope of the Sherman Act.

4. The court of appeals erred in concluding that the State Bar was immune from liability under the Sherman Act on the ground that its role in the challenged fee fixing constituted "state action" and it was hence exempt under *Parker* v. *Brown,* 317 U.S. 341. The State Bar's promulgation and endorsement of minimum fee schedules satisfies none of the three bases for establishing state action that *Parker* announced.

First, the schedules do not derive their authority and efficacy from the legislative command of the state (*id.* at 350), since the Virginia legislature has not specifically authorized or required the use of such schedules. Second, the State Bar's activities concerning the schedules did not constitute actions of the state or its officers or agents directed by its legislature (*id.* at 350–351), since the State Bar consists of all lawyers practicing in Virginia and is not a state agency.

Finally, the schedules have never been adopted, approved or enforced by the state or a state agency

(*id.* at 352). The Virginia Supreme Court is the only arguably relevant state agency. That court's approval of reference to "customary charges" or "suggested" fee schedules as being among the several factors to be considered by lawyers in setting fees does not constitute the requisite state approval of the use of minimum fee schedules. The court of appeals erred in concluding that the state court's failure to disapprove such schedules constituted such approval.

ARGUMENT

I. INTRODUCTION—THE LEGAL PROFESSION AND MINIMUM FEE SCHEDULES

A. THE LEGAL PROFESSION

In "the distribution of legal assistance, [which,] like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise" (*Fuller* v. *Oregon*, 417 U.S. 40, 53), the lawyer can be described as "'a self-employed business man.'" Patterson & Cheatham, *The Profession of Law* 263–264 (1971). The practice of law now constitutes a significant segment of the national economy. In 1973, the provision of legal services accounted for $9.3 billion of total national income. *Statistical Abstract of the United States* 371, 752 (1974). Of some 325,000 lawyers in the United States in 1970, more than 236,000 were in private practice. *Id.* at 158.[9]

[9] According to one estimate, in 1970 about 73 percent of all lawyers were in private practice, twelve percent privately employed, and fourteen percent in government service, of which three percent were in the judicial branch. York & Hale, *Too Many Lawyers? The Legal Services Industry: Its Structure and Outlook*, 26 J. Leg. Educ. 1, 7–10 (1973). In Virginia there were 6,401 lawyers in 1970, of whom 4,354 were in private practice. *Statistical Abstract of the United States* 158 (1974).

No longer do all lawyers operate as independent enterpreneurs of legal services. Numerous law firms are now large organizations with more than 100 lawyers, often having offices in several cities—perhaps several countries. Cf., *e.g.* Smigel, *The Wall Street Lawyer* 206–207 (1964). In Virginia and many jurisdictions, moreover, law firms can and do now operate as corporations.[10]

The development of the modern large law firm has paralleled and been closely interrelated with the development of business generally. Cf., *e.g.*, Smigel, *supra*, at 4–8; Goulden, *The Superlawyers* (1971). The connection between commercial activity and the legal profession is graphically reflected by figures showing the distribution of attorneys in the United States. As one recent study of the legal profession observed:

> The demand for legal services today is mainly a function of institutional economic activity. It is dependent upon the number of corporations in the market, the volume of retail sales, and the number and size of retail and service organizations. Although there are certain forms of demand for legal services which have an obvious relationship to the population—such as personal-injury litigation or will pro-

[10] See, *e.g.*, Cal. Bus. & Prof. Code Ann., Sec. 6160, *et seq.* (Supp.); Md. Code Ann., Sec. 23–441, *et seq.*; N.Y. Bus. Corp. L. Ann., Sec. 1501, *et seq.* (Supp); Pa. Code Ann., Sec. 15–12601, *et seq.*; Va. Code Ann., Sec. 13.1–542, *et seq.*, 54–42.2–42.3 (Supp.).

> bation—legal services are increasingly demanded by institutions and those who must deal with them. [York & Hale, *Too Many Lawyers? The Legal Services Industry: Its Structure and Outlook,* 26 J. Leg. Educ. 1, 13 (1973).]

The study also concluded that "economic activity rather than population is the best indicator of demand for, and hence supply of lawyers" (*id.* at 10), and that about half of the country's lawyers are located in five industrial states where commerce is most intense (New York, California, Illinois, Texas and Ohio) and at the seat of the federal government in the District of Columbia. *Ibid.* Although no detailed data are available, it has been estimated that about 40 percent of all private lawyers' income derives from serving commercial interests, the other 60 percent deriving from services involving individuals. See Mayer, *The Lawyers* 19–20 (1966).

B. THE NATURE OF FEE SETTING AND THE ROLE OF MINIMUM FEE SCHEDULES

Whatever once may have been thought about lawyers' fees, "[t]here is nothing left of the pose that the lawyer receives only an honorarium slipped into the hind pocket of his gown out of the gratitude of the client." Patterson & Cheatham, *supra,* at 263–264. Fee setting is not only "the least 'learned' part of the profession" (Pet. App. A–5), as the district court aptly observed, it is the most commercial aspect of law practice. Moreover, the setting of fees involves "an inescapable conflict of interest between lawyer and client" (Patterson & Cheatham, *supra,* at 269), so that it is

an area less satisfactorily left to regulation by ethical considerations primarily implemented by the person facing conflicting pressures.

Although American legal history has been marked by sporadic local efforts at collective fee setting since the Republic's earliest days,[11] the practice more generally prevailing until recent decades was reflected in Justice Holmes' opinion in *Hyde* v. *Moxie Nerve Food Co.,* 160 Mass. 559, 560–561, 36 N.E. 585, 586):

> Free competition prevails at the bar as well as elsewhere, and different men command different rates of compensation—some of them much in excess of any official salaries. Thus far the experience of the Commonwealth has been that this freedom has not operated to keep citizens from the courts, or to shut the poor off from justice.

Beginning in the 1950's, however, minimum fee schedules were widely adopted by unified bars or bar associations at the state and local levels. Branca, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption that Doesn't Exist,* 3 U.C.L.A.-Alaska L. Rev. 207, 208 (1974). Minimum fee schedules have been adopted by bar organizations at the state-wide level in 34 states and the District of Columbia and by more than 700 local bar organizations. *Id.* at 208. Moreover, since many of these states now have unified or integrated

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[11] In 1796, members of the Boston Bar adopted schedules of charges by which lawyers bound themselves "not to receive less fees or compensation than therein expressed." II Chroust, *The Rise of the Legal Profession in America* 233, n. 36 (1965).

bars,[12] with whose requirements a lawyer-member must comply, the impact of such schedules has been enhanced. Indeed, the vast majority of lawyers apparently make some use of minimum fee schedules. Arnould & Corley, *Fee Schedules Should Be Abolished,* 57 A.B.A.J. 655, 660 (1971).

More than 35 years ago, in an effort to improve the economic condition of the legal profession, the American Bar Association concluded that the purpose of minimum fee schedules was "[e]ssentially * * * to discourage competitive price-cutting and to check the practice some laymen have of shopping around among lawyers * * *." American Bar Ass'n, *The Economics of the Legal Profession* 153 (1938). A more recent study similarly concluded that the aim of minimum fee schedules is still "to prevent that 'shopping around' among lawyers which many regard as the reason why the legal profession has failed to keep pace with the doctors in income growth over the last generation." Mayer, *supra,* at 22. Not surprisingly, fee schedules appear to be used most heavily by low-income lawyers. Arnould & Corley, *supra,* 57 A.B.A.J. at 660.

Collective fee determination pits each client against the organized strength of the bar as a whole, and denies the client the right, enjoyed in other affairs, to choose among offerings of comparable quality on the basis of price. Moreover, collective fee setting

[12] See generally McKean, *The Integrated Bar* (1963); *Lathrop* v. *Donohue*, 367 U.S. 820. Integrated bars have already been established in 29 states, the District of Columbia and Puerto Rico; Arkansas has a partially-integrated bar (*1973–1974 American Bar Ass'n Directory* 143A–146A) and Montana is expected to have an integrated bar in 1975.

deprives both client and lawyer of the right to determine for themselves the compensation to be paid for personal services rendered,[13] and is directly inconsistent with the independence that has been the hallmark of the private practitioner in America.[14] As the district court observed (Pet. App. A–5):

> [T]here is a basic inconsistency between the lofty position that professional services, not commodities, are here involved and the position that a minimum fee schedule is proper. The former properly contemplates differences in abilities, worth and energies expended of those rendering the services. Such differences are made as meaningless by a minimum fee schedule as they would be by a maximum fee schedule.

The primary impact of minimum fee schedules is upon small businesses and middle income individuals,

[13] Cf. *In re Estate of Freeman*, 34 N.Y. 2d 1, 311 N.E. 2d 480, 355 N.Y.S. 2d 336, stating that, while a surrogate court's reference to a minimum fixed fee schedule in setting a fee award was not invalid under a state statute similar to the Sherman Act, the use of such schedules by lawyers to hinder fee competition may be unethical. 34 N.Y. 2d at 11, 311 N.E. 2d at 485, 355 N.Y.S. 2d at 342.

[14] One legal historian has written (I Chroust, *The Rise of the Legal Profession in America* xii–xiii (1965)): [A] learned profession such as the legal profession always presupposes individuals who are free to pursue a learned art unhampered by outside political influence. Only a free individual can strive for the greatest possible development and unfolding of all his moral and intellectual powers by way of an undeterred application of his chosen field of learning and the free exercise of his trained judgment. Anything which tends to weaken the independence of the lawyer as a 'private person' in the long run is destructive of the profession as a whole."

who only occasionally use legal services. Proponents of such fee schedules assert that they are most useful "in routine affairs that affect the individual: divorce, adoption, sale of a home, probating a smaller estate or routine appearance in court." Miller & Weil, *Let's Improve, Not Kill, Fee Schedules,* 58 A.B.A.J. 31, 32 (1972). Such schedules also typically cover transactions likely to be encountered by small businesses, such as creation and dissolution of partnerships and corporations, bill collection, minor litigation, foreclosure and bankruptcy. See Arnould & Corley, *supra,* 57 A.B.A.J. at 657.

By contrast, legal services for large enterprises and persons of wealth tend to be unaffected by minimum fees, because the general level of fees to such individuals and enterprises is usually well above the scheduled minima. The poor, on the other hand, have access to various forms of publicly-financed or uncompensated, voluntary legal services. See generally Note, *A Critical Analysis of Bar Association Minimum Fee Schedules,* 85 Harv. L. Rev. 971 (1972); Christensen, *Lawyers for People of Moderate Means* 18–39 (1970).

Minimum fixed fee schedules have adverse economic consequences. In some cases, the minimum fee level will be higher than the level that would prevail if the fee were set by the free competitive interaction of supply and demand so as to reflect the true economic value of the services rendered. Although no evidence was presented to the district court in this case that the minimum fee schedule involved here "does permit the charging, by an attorney, of more than the services

are worth" (Pet. App. A–5), the court noted that such schedules may result in inflated fees not measured by "differences in abilities, worth and energies expended of those rendering the services" (*ibid.*).[15] In fact, the levels of minimum fee schedules strongly suggest that such schedules provide "unreasonable" fees that "cannot be justified by * * * economic conditions." Arnould & Corley, *supra,* 57 A.B.A.J. at 657, 658.

The impact of fee schedules, moreover, is not confined to transactions billed at the minimum level. The fixing of a minimum fee naturally tends to affect other charges because the scheduled minimum rate can be and often is used as a starting point for pricing of legal services—both those directly covered by the schedule but billed at above-minimum rates and those not covered by the schedule.

For many of the legal services significantly affected by minimum fee schedules, the demand is likely to be price-inelastic, in that the client must employ a lawyer. The instant case is a classic example, since in Virginia various aspects of real estate transactions must be handled by lawyers,[16] unlike other jurisdictions, such as the District of Columbia, where similar

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[15] This may occur, for example, where a lawyer is handling a large number of similar transactions and charges the same fee for work that is essentially repetitive, involving marginal costs far below the minimum fee level. Fixed fee schedules thus may tend to produce charges that are not related to the professional factors—skill, time and responsibility—that should form the basis for lawyers' fees.

[16] See Unauthorized Practice of Law Opinion No. 207, *Virginia State Bar—Opinions* 239 (1965 ed.).

services have customarily been supplied by title companies. In that situation, the consumer has no choice but to pay at least the price established by the fee schedule.

Not surprisingly, real estate closing costs in the Washington metropolitan area are substantially higher in Northern Virginia than in the District of Columbia, in part because lawyers' fees in Virginia were higher than title company charges in the District for comparable services. See *Washington Post*, January 9, 1972, p. A1; *id.*, January 10, 1972, p. A1; *id.*, January 11, 1972, p. A1; *id.*, January 12, 1972, p. A1.

In transactions involving discretionary use of legal services, the inevitable tendency of minimum fee schedules will be to lead some consumers to forego legal services that they need and would use if a lawyer charged, or had been free to charge, a lower fee. If each individual lawyer can determine his own fees, economic principles will operate as in other free markets, tending to force prices and the offering of legal services to levels better matched to the public's needs.[17]

[17] Under a regime of competitive fee-setting, each lawyer's offering of services is forced toward a level that equals the price that clients can be induced to pay. "No lawyer can demand much more than this price without losing clients to lawyers whose services are considered comparable and who are willing to accept no more than the normal profit already included in total cost." Note, *supra*, 85 Harv. L. Rev. at 976–977. Unrestrained individual fee-setting also tends to allocate limited resources to those lawyers who are most efficient in utilizing them. See *id.* at 977. See also Arnould & Corley, *supra;* Miller & Weil, *supra.*

Arguments for and against fixed fee schedules among English solicitors are analyzed in Zander, *Lawyers and the Public Interest: A Study in Restrictive Practices* 185–208 (1968).

II. THE PROHIBITIONS OF THE SHERMAN ACT APPLY TO RESTRAINTS OF TRADE AMONG MEMBERS OF "LEARNED PROFESSIONS"

In reversing the district court's judgment as to the Association, the court of appeals concluded that th prohibition of the Sherman Act against "[e]very * * * restraint of trade or commerce among the several States" does not apply to restraints upon the practice of a "learned profession" such as law (see, p. 21–30, supra). Insofar as that conclusion rests upon erroneous assumptions about the reach of the Sherman Act into the "trade or commerce" of the nation, we discuss it in point III. Here we show that such an exemption is without basis in the language, history, policy and past interpretations of the Act, and is not required to accommodate any special circumstances concerning the practice of law.

A. NEITHER THE LANGUAGE NOR LEGISLATIVE HISTORY OF THE SHERMAN ACT JUSTIFIES AN EXEMPTION FOR COMPETITIVE RESTRAINTS BY MEMBERS OF "LEARNED PROFESSIONS"

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations * * *." 15 U.S.C. 1. This comprehensive prohibition does not expressly exempt members of "learned professions," and such an exemption may not be lightly

implied. See, *e.g.*, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350–351; *California* v. *Federal Power Commission*, 369 U.S 482, 485.

As we show below (see n. 18, *infra*), nothing in the legislative history of the Sherman Act indicates that the phrase "trade or commerce" was not intended to cover all commercial restraints, no matter by whom imposed. Accordingly, the Act has been construed as applying to restraints affecting a variety of services unrelated to the production of goods. See, *e.g.*, *Radovich* v. *National Football League*, 352 U.S. 445 (professional football); *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 489–492 (real estate dealers); *American Medical Ass'n* v. *United States*, 317 U.S. 519 (medical care and hospitalization); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 435–437 (dry cleaners); *United States* v. *Utah Pharmaceutical Ass'n*, 201 F. Supp. 29, 35–36 (D. Utah), affirmed *per curiam*, 371 U.S. 24 (pharmacies).

If Congress had intended to exempt from the broad prohibitions of the Sherman Act price-fixing or other competitive restraints imposed by members of some undefined category of "learned professions," presumably that intent would have been reflected in the extensive legislative history of the Act. However, proponents of an exemption for the "learned professions" have proffered no such history, and we have found none.[18]

[18] The only relevant history we have found shows that it was thought unclear whether the original Sherman bill (S. 1, 51st Cong., 1st Sess.), which applied only to combinations preventing competition in "articles of growth, product or manufacture," would apply to "combinations * * * between bar associations and doctors for raising their prices or fees * * *." 21 Cong. Rec. 2726. Any doubts were presumably eliminated when the language of the bill was broadened to cover, as enacted, "[e]very contract, combination * * * or conspiracy, in restraint of trade or commerce * * *." 15 U.S.C. 1.

In *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, the Court held the insurance business not to be exempt from the Sherman Act, in the face of far more substantial evidence than exists here that Congress did not intend the Act to reach that business. See *id.* at 556–558, 574–577.

B. THIS COURT HAS NEVER RECOGNIZED A SHERMAN ACT EXEMPTION FOR MEMBERS OF "LEARNED PROFESSIONS"

The court of appeals based its ruling that the Sherman Act does not cover price-fixing by members of a "learned profession" upon dicta in this Court's decisions in *Federal Baseball Club of Baltimore, Inc.* v. *National League*, 259 U.S. 200, and *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643. In neither case, however, was that question before the Court. Justice Holmes' opinion in *Federal Baseball*, in holding that professional baseball was not "commerce" covered by the Sherman Act, stated broadly that "personal effort, not related to production, is not a subject of commerce." 259 U.S. at 209. The Court's decision rested, however, upon an approach to the Congressional power to regulate commerce that it has since rejected. The actual holding in *Federal Baseball*, characterized by this Court as an "aberration"

(*Flood* v. *Kuhn*, 407 U.S. 258, 282), has survived only by virtue of the doctrine of *stare decisis*. *Ibid.*[19]

Raladam did not even involve the Sherman Act. There the Court set aside a Federal Trade Commission order against the sellers of an obesity cure, under Section 5 of the Federal Trade Commission Act, because there was no evidence of the injury to competition required under Section 5 as originally enacted. In dictum the Court observed that while some doctors may have been misled by the seller's advertisements, they "follow a profession and not a trade" and were not in competition with the seller. 283 U.S. at 653.

Since *Federal Baseball* and *Raladam* this Court has made plain that neither case established an exemption for "learned professions," because it has in later cases treated that question as still an open one which it had no need to decide.[20]

The court of appeals also relied upon this Court's reference in *Atlantic Cleaners & Dyers, Inc.* v. *United States, supra,* 286 U.S. at 435–436,[21] to language in

[19] The Court's comment in *Federal Baseball* that "a firm of lawyers sending out a member to argue a case * * * does not engage in such commerce because the lawyer * * * goes to another State" (259 U.S. at 209) would have been superfluous if lawyers were exempt from the coverage of the Sherman Act by reason of being members of a "learned profession."

[20] Thus, the Court found it unnecessary to decide in *American Medical Ass'n* v. *United States*, 317 U.S. 519, 528, "whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act." and in *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 491–492, declined to "intimate an opinion" on whether the "professions" constitute "trade" under the Sherman Act.

[21] See also *United States* v. *National Ass'n of Real Estate Bds.*, *supra*, 339 U.S. at 490–491.

a decision by Justice Story in 1834, on circuit, in which he held that mackerel fishing was a "trade" within the meaning of the Coasting and Fishery Act of 1793, 1 Stat. 316. *The Nymph*, 18 Fed. Cas. (No. 10388) 506 (C.C. Me.). In an extended discussion concerning the varied meanings of the word "trade," Justice Story said in passing that "[w]herever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade." *Id.* at 507. That characterization of the meaning of "trade" in a 1793 statute, however, provides little meaningful guidance in applying to the realities of the 1970's the broad language of the Sherman Act of 1890.

In *Atlantic Cleaners*, moreover, the Court did not rely upon the reference in *The Nymph* to "learned professions," but rather applied Justice Story's "broad" interpretation of "trade" in holding that the business of cleaning, dyeing and renovating clothes constituted "trade or commerce" covered by Section 3 of the Sherman Act.

C. APPLICATION OF THE SHERMAN ACT TO THE COMMERCIAL ASPECTS OF LAW PRACTICE WILL SERVE THE PURPOSES OF THE SHERMAN ACT WITHOUT DISSERVING ANY IMPORTANT INTEREST UNDERLYING THE REGULATION OF THE PRACTICE OF LAW

The ultimate purpose of the Sherman Act is to protect the consumer through preservation of competition. See, *e.g.*, *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 4–5; *United States* v. *Topco Assocs., Inc.*,

405 U.S. 596, 610. Although an anti-competitive restraint in a business or profession may directly affect only the members of that group, as is the case with fixed minimum fee schedules, the ultimate economic injury is borne by the public at large in the form of higher costs, and unavailability of legal services. For this reason, the court of appeals' suggestion that collective price fixing by members of learned professions is consistent with the Sherman Act so long as it restrains only the business of other members of the profession, and not other commercial activities, is unsound (Pet. App. B–15).

Nor is the Sherman Act rendered inapplicable to commercial restraints within the learned professions because such restraints are assertedly motivated by a non-commercial purpose. Application of the antitrust laws does not depend upon the motives of those who restrain competition, but upon the economic effects of their conduct. As this Court stated in *United States* v. *National Ass'n of Real Estate Bds., supra,* 339 U.S. at 489:

> Price-fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve. That is the teaching of an unbroken line of decisions. [Accord, *United States* v. *Socony-Vacuum Oil Co.,* 310

> U.S. 150, 224–226, n. 59; *United States* v. *Trenton Potteries Co.,* 273 U.S. 392, 396–401.] [22]

In any event, as we have indicated (see pp. 16–20 *supra*), a primary purpose of minimum fee schedules is to increase lawyers' incomes, and an inevitable consequence is either to prevent consumers from using legal services or to require that they pay more for the legal services they use.

The claim that anticompetitive policies are being enforced only to eliminate improper practices and raise ethical standards in an industry is no novelty in antitrust litigation; too frequently, however, the "unethical" conduct in question turns out to be the vigorous competition that the antitrust laws are designed to stimulate and protect. See, *e.g., Sugar Institute, Inc.* v. *United States,* 297 U.S. 553, 598–602;

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[22] The result in *Marjorie Webster Jr. College, Inc.* v. *Middle States Ass'n of Colleges & Secondary Schools, Inc.,* 432 F. 2d 650 (C.A.D.C.), certiorari denied, 400 U.S. 965, is not to the contrary, although we disagree with the court's rationale. That case did not involve a *per se* offense like price-fixing. It held that a college accreditation association's refusal to accredit any proprietary institution did not violate Section 1 of the Sherman Act. Drawing a line between commercial and "non-commercial aspects of the liberal arts and the learned professions" (432 F. 2d at 654), the court found that the challenged restriction was motivated solely by educational concerns, not by a purpose to effect the commercial aspects of education, and thus was permissible as an incidental restraint of an essentially noncommercial activity. The court declared, however, that restrictions with commercial motivations would be subject to antitrust policy. 432 F. 2d at 654–655.

We question the soundness of the "commercial motivation" test, in view of this Court's decisions in *Real Estate* and other cases. Nevertheless, even under *Marjorie Webster*, bar association fixed minimum fee schedules must be viewed as essentially "commercial," rather than non-commercial (see *supra*, pp. 14–17), and hence invalid.

Fashion Originators' Guild of America, Inc. v. *Federal Trade Commission*, 312 U.S. 457, 467–468; *United States* v. *National Ass'n of Real Estate Bds.*, *supra*, 339 U.S. at 489.

Application of the Sherman Act to fee-fixing by lawyers will not, as the court of appeals feared, necessarily undermine admission standards and other ethical criteria that might have some restraining effect on competition. Unlike price-fixing, which is illegal *per se* because of its almost uniformly pernicious effects, most other restraints of competition are subject to the rule of reason, which calls for balancing the various harms and benefits resulting to the public by the conduct in question. See *Standard Oil Co.* v. *United States*, 221 U.S. 1, 61–68; *Northern Pac. Ry.* v. *United States*, *supra*, 356 U.S. at 4–5; *United States* v. *Topco Assocs., Inc.*, *supra*, 405 U.S. at 606–607. The impact of the Sherman Act on such other professional standards is not before the Court in this case, and cannot effectively be considered in the abstract. We note only that invalidation of minimum fee schedules is not inconsistent with a ruling that the Sherman Act permits the collective adoption and enforcement of standards concerning essentially noncommercial professional conduct that are no more restrictive than necessary to assure the public a satisfactory level of professional service. Cf. *United States* v. *Oregon State Medical Soc'y*, 343 U.S. 326, 336; *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 357.

The decision of the court of appeals in this case "actually forges a new exemption to the Sherman Act." *United States* v. *Oregon State Bar*, No. 74–362

(D. Ore.), decided November 22, 1974 (Pet. Br. App., B–18). In *Oregon State Bar*, the district court denied the state bar association's motion to dismiss an antitrust action by the United States challenging minimum fixed fee schedules as violating Section 1 of the Sherman Act. In declining to follow the court of appeals' decision here, the district court noted (*id.* at B19):

> There are indeed many factors which might convince a lawmaking body that the legal profession should not be subject to all the rigor of the Sherman Act. However, the creation of exemptions to the Sherman Act is the province of Congress, not the courts. * * * It is not for this court to create a new exemption to the Sherman Act for so-called "learned professions."

Additional reasons why any Sherman Act exemption for lawyers should be made by Congress, not by the courts, were recently indicated by the district court in *United States* v. *National Soc'y of Professional Eng'rs* Civ. No. 2412–72 (D.D.C.), decided December 19, 1974. In rejecting a claim that the Sherman Act exempted limitations on competitive bidding imposed by an association of ~~engineering firms~~ engineers upon its members, the court stated (App., *infra*, 8a):

> The issue of whether a profession is a learned one is not seen by the Court as the appropriate approach for resolving the higher question of whether the Sherman Act is applicable to that profession. To engage in such an inquiry would chart the Court on a semantic adventure of questionable value. It would be a dangerous form of elitism, indeed, to dole out exemptions

> to our antitrust laws merely on the basis of the educational level needed to practice a given profession, or for that matter, the impact which the profession has on society's health and welfare.

Lawyers provide services that are often also available from other sources, such as real estate brokers and title companies. If the Sherman Act prohibits such alternative sources from fixing the prices of such services (see, *e.g., United States* v. *National Ass'n of Real Estate Bds., supra*), then surely it prohibits such price-fixing by lawyers, absent a clear expression of Congressional intention to exempt one group but not the other. In any event, "if exceptions [for 'learned professions'] are to be written into the Act, they must come from the Congress, not this Court" (*United States* v. *South-Eastern Underwriters, Ass'n,* 322 U.S. 533, 561), because, "to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required." *United States* v. *Topco Assocs., Inc., supra,* 405 U.S. at 612.[23]

[23] The Court has found an implied exception to the Sherman Act for activities that may incidentally restrain commerce where other legislation has expressed a Congressional policy to exempt certain actions undertaken by a group primarily for purposes other than to restrain trade or commerce. *E.g., Apex Hosiery Co.* v. *Leader,* 310 U.S. 469; *United Mine Workers* v. *Pennington,* 381 U.S. 657, 661–669. It has also based an implied exception upon the need to accommodate constitutionally-protected rights to petition for redress of grievances or to engage in other types of political action. *E.g., Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127; *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 379–380. No such basis exists, however, for an exemption of commercial restraints by members of "learned professions."

III. THE MINIMUM FIXED FEE SCHEDULE RESTRAINS INTERSTATE COMMERCE

In holding that the Association's minimum fee schedule does not restrain interstate commerce, the court of appeals relied upon an unjustifiably narrow view of the scope of commerce covered by the Sherman Act, and erred in concluding that the record in this case did not establish the requisite interstate nexus.

A. LOCALLY-ORIENTED RESTRAINTS ARE PROHIBITED BY THE SHERMAN ACT IF, VIEWED EITHER IN ISOLATION OR AS PART OF A GENERAL PRACTICE, THEY MAY SIGNIFICANTLY AFFECT INTERSTATE COMMERCE

The Sherman Act's prohibition of "[e]very contract, combination * * * or conspiracy, in restraint of trade or commerce" extends to the full reach of Congress' power to regulate interstate and foreign commerce. *E.g., Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 495; *United States* v. *Frankfort Distilleries, Inc.,* 324 U.S. 293, 298. The Sherman Act applies both to activities occurring in commerce and to those substantially affecting it. *Burke* v. *Ford,* 389 U.S. 320, 321; *United States* v. *Employing Plasterers Ass'n,* 347 U.S. 186, 189.

The Act's applicability to intrastate transactions that affect interstate commerce does not depend on whether the particular activity is "local" in some sense. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 234; cf. *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 121; *Wickard* v. *Filburn,* 317 U.S. 111, 118–129; *Katzenbach* v. *McClung,* 379 U.S. 294, 301–305.

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze. [*United States* v. *Women's Sportswear Mfrs. Ass'n,* 336 U.S. 460, 464.]

The Court recently quoted *Women's Sportswear* with approval in *Gulf Oil Corp.* v. *Copp Paving Co.,* No. 73–1012, decided December 17, 1974, slip op. 8.

B. THE RESTRAINTS CHALLENGED IN THIS CASE SUBSTANTIALLY AFFECT INTERSTATE COMMERCE

The district court's findings of fact show that the application of minimum fixed fee schedules to real estate transactions in northern Virginia substantially affects interstate commerce.

The court found that "a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia" (Pet. App. A–4), and that almost half of the deeds of trust of under $100,000 that identify the location of the mortgagee, as sampled in the Office of the Recorder of Deeds for Fairfax County, showed the mortgagee to be located outside the state (*id.* at A–7). Almost all the lenders making mortgage loans require title insurance and a title examination (*id.* at A–4). The court also found that a substantial percentage of Fairfax County residents work outside of Virginia and that a significant volume of loans on Fairfax

County real estate is guaranteed by government agencies headquartered in the District of Columbia (*ibid.*), and that more than 31 percent of the persons who lived in Fairfax County in 1970 had lived outside of Virginia in 1965 (*id.* at A–7).

On these facts, the district court found the Association's minimum fixed fee schedules for title examinations and for the preparation of title insurance papers by attorneys in Virginia substantially affect interstate commerce (*id.* at A–4).

The court of appeals did not disturb these findings. Instead, it rejected the ultimate conclusion that the challenged fee schedules directly and substantially affect interstate commerce. This ruling, as noted (see pp. 21–22, *supra*), rested on theories of the limited scope of the commerce power no longer current, and the mistaken view that use of an attorney's services affects commerce only incidentally because the interstate aspects of real estate transactions in Fairfax County are merely "a fortuitous circumstance" (Pet. App. at B–18).

This unrealistic characterization ignores the clear pattern and heavy volume of interstate transactions shown in the record and found by the district court. No out-of-state lender will finance a real estate transaction without the safeguards that are available in Virginia only through the services of an attorney. Those services are not incidental, but they are indispensable to interstate financing of real estate transactions in Virginia, to the purchase of housing by new

State Bar's activities in proposing and enforcing the minimum fee schedules.

Parker v. *Brown* was a suit by a producer and packer of raisins seeking to enjoin the California Director of Agriculture from enforcing an agricultural proration program imposing price and other limitations on the sale of raisins, established pursuant to state legislation specifically providing for such programs. The plaintiff claimed that the state program was preempted by the Sherman Act and the Agricultural Marketing Agreement Act, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*, and that it impermissibly burdened interstate commerce in violation of the Commerce Clause.

Participation in these programs was mandatory, and the statute provided criminal penalties for noncompliance. Further, even though organization of a prorate marketing plan was first proposed by private parties (*i.e.*, the producers), and although the producers had to approve the prorate program by referendum, the State Agricultural Prorate Advisory Commission had the final authority to revise, modify, reject, or approve proration programs. This Commission consisted of the California Director of Agriculture and eight other members (including one consumer representative) appointed by the Governor with the consent of the State Senate. The Commission was to exercise final authority only after holding a public hearing and finding that the program would carry out the objectives of the legislation. Thus, the Commission *possessed and exercised* full control over the establishment of proration programs. *Id.* at 352. That

Virginia residents, and to government financing of real estate transactions there.[24]

IV. THE ACTIONS OF THE STATE BAR IN PROPOSING AND ENFORCING THE CHALLENGED MINIMUM FEE SCHEDULE ARE NOT EXEMPT FROM THE SHERMAN ACT AS INVOLVING "STATE ACTION"[25]

The court of appeals concluded that the actions of the State Bar in proposing minimum fixed fee schedules and threatening to enforce them were within the implied exemption from the Sherman Act for "state action" recognized in *Parker* v. *Brown, supra,* 317 U.S. at 350–352 (Pet. App. B–4—B–12). Under that doctrine, restraints of trade do not violate the Sherman Act where they (1) derive their "authority and * * * efficacy from the legislative command of the state" (317 U.S. at 350), (2) consist of activities of "a state or its officers or agents * * * directed by its legislature" (*id.* at 350–351), and (3) are adopted, approved and enforced by the state or a state agency, acting as such. *Id.* at 352. We submit that this doctrine does not exempt from the Sherman Act the

[24] It cannot seriously be suggested that lawyers are necessarily beyond the coverage of other acts of Congress regulating commerce (*e.g.*, 29 U.S.C. 141, *et seq.* (labor-management relations); 29 U.S.C. 201, *et seq.* (fair labor standards); 29 U.S.C. 651, *et seq.* (occupational safety and health); 42 U.S.C. 2000e, *et seq.* (equal employment opportunities)). Respondents have not suggested, nor did the court of appeals hold, that the practice of law is exempt from the Sherman Act because it is beyond the power of Congress to regulate.

[25] While we specifically address only the question whether the court of appeals erred in holding the State Bar's actions exempt under *Parker* v. *Brown*, we believe that the Association's claim of such an exemption is invalid *a fortiori*.

the *state* was the ultimate source of these programs was clear.

As this Court pointed out, a declared purpose of the statutory scheme was "to 'conserve the agricultural wealth of the State' " by raising and maintaining prices. *Id.* at 346. Thus, the California legislature had in a clear and specific manner established a basic state policy against free price competition in the marketing of raisins and had commanded state officials and private parties to carry out this policy under penalty of law.

This Court did not decide whether the Sherman Act preempted the state program, because it concluded that the Act was inapplicable. The Court held that the program was so specifically mandated by the state as to constitute "state action," *i.e.*, an act of government, to which the Sherman Act was not intended by Congress to apply. *Id.* at 350–352. Assuming that the prorate program would violate the Sherman Act if organized and effected by virtue of a contract, combination or conspiracy of private persons, the Court held that, because the program "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command" (*id.* at 350), it was *in fact* that action of the State of California and hence not subject to the Sherman Act.

The Court repeatedly emphasized that the antitrust exemption it found was limited to official action of a state's officers or agents which is directed, commanded or imposed by the state legislature or by a

duly authorized arm of the state (*id.* at 351–352; emphasis supplied):

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action *directed* by a state. * * *
>
> * * * * * *
>
> * * * Here the state *command* to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act * * *.
>
> The state * * * *imposed* the restraint as an act of government which the Sherman Act did not undertake to prohibit.

The State Bar's activities in connection with the minimum fee schedule did not constitute the direction, command or imposition of the program by the State of Virginia or its officials. Under Virginia law, the State Bar is an association "composed of the attorneys-at-law of this State * * *." Va. Code 54–49. Governed by rules promulgated by the Supreme Court of Virginia,[25] the State Bar is "to act as an administrative agency of the Court for the purpose of investigating and reporting violations" of rules adopted by the Court pertaining to the practice of law. *Ibid.* The Supreme Court is authorized to require that all persons practicing law in Virginia be members of

[25] Prior to 1974, the state court was known as the Supreme Court of Appeals, but we shall refer to it by its current name.

the State Bar in good standing (*ibid.*), and it has done so. Article IV, Part Six, Va. Sup. Ct. R., 205 Va. 1033, as amended, 210 Va. 411.

Only active practitioners, the vast majority of whom practice privately (see p. 13, *supra*, n. 9), may serve as officers of the State Bar. 205 Va. 1011, 1033. It is controlled by a Council consisting of attorneys elected from the state's judicial circuits plus six judicially-appointed members and the President, the immediate Past-President and President Elect (Pet. App. B–11, n. 31). The State Bar derives funds from fees collected from member attorneys, which are deposited in a State Bar Fund in the State Treasury, earmarked for use only by the State Bar, and disbursed on vouchers from officers of the State Bar. Va. Code 54–52. The Council has power "[t]o make allocations of funds within the amounts available." Rule 9(g), 205 Va. 1038.

Thus, the State Bar is essentially a self-regulating organization of private persons operating under the aegis of state law and general rules established by the Supreme Court. It serves as the Court's administrative agency, to investigate and report upon violations of the rules adopted for governance of the Bar. The Supreme Court has issued such rules, but they do not establish or provide for minimum fee schedules. See Articles II and IV, Part Six, 205 Va. 1011, as amended, 210 Va. 411, 211 Va. 295.[26]

[26] Canon 12 of the Canons of Professional Ethics promulgated by the Supreme Court of Virginia, 205 Va. 1012, referred to "the customary charges of the Bar for similar services" as one of six factors that could properly be considered in fixing the fee. *Id.* at 1015–1016. However, it also emphasized that "[n]o one of these considerations in itself is controlling." *Id.* at 1016. "Customary charges" therefore appears to refer to the generally prevailing price level for the service, rather than to fixed fees as such.

Effective January 1, 1971, the Supreme Court repealed the previous Canons of Professional Ethics and replaced them with the Code of Professional Responsibility promulgated by the American Bar Association. 211 Va. 295. Ethical Consideration 2–18 and Disciplinary Rule 2–106(B)(3) provide, respectively, that suggested fee schedules and "customary charges" in the community offer some guidance as to reasonable fees. *Id.* at 302, 313. The State Bar, however, has since declined to follow the ruling of the American Bar Association that even habitual failure to follow a minimum fee schedule is itself not misconduct (see p. 3, *supra*, n. 4), and has reaffirmed its view that such conduct is unethical (A. 47–48).

The State Bar was involved in the promulgation and enforcement of the Association's fixed fee schedules challenged here, and the parties have stipulated that the Supreme Court has declared "that suggested fee schedules and economic reports of the State Bar and of Local Bar Associations involve questions of ethics within the [authority of]" the State Bar and the Supreme Court (Pet. App. A–19). The district court found that the State Bar has issued opinions (A. 45–48) that in effect declare unethical the practice of habitually charging fees below those suggested in a minimum fee schedule (Pet. App. A–5). Moreover, the State Bar distributed minimum fee schedule reports which became the basis for the minimum fee schedules published by local bar associations in Virginia, including the Association (*id.* at A–18).

The fact that the Supreme Court has declared that suggested fee schedules and economic reports involve questions of ethics does not establish that the schedules are "state action." Under *Parker* v. *Brown* the

question is whether the state has authorized and required such schedules, not whether it had sanctioned regulation of their use. See *United States* v. *Oregon State Bar, supra* (Pet. Br. App. B9–B13); cf. *In re Estate of Freeman,* discussed at p. 17, *supra,* n. 13.

The fee schedules here were not required by any legislative command of the state,[27] and were not adopted, specifically approved, or directly enforced by the Supreme Court, the only arguably relevant state agency.[28] The court of appeals held dispositive the fact that the state court has a general statutory duty to supervise the State Bar in prescribing and enforcing the court's code of ethics for attorneys. The "state action" exemption, however, does not arise from the mere fact that economic activity is regulated by the state, even when that regulation is extensive and detailed.

As this Court recently stated in a different context, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.,*

[27] The court of appeals characterized certain stipulations as asserting that the regulatory program of the State Bar had "received its authority and efficacy from legislative command" (Pet. Br. App. B–12), but it is evident from the underlying stipulations (Pet. App. A–17—A–19) that the court of appeals' conclusory description of the stipulations goes beyond their actual scope.

[28] As the court of appeals correctly recognized (Pet. App. B–11), the State Bar itself, consisting of those subject to regulation, has insufficient independence to be regarded as a state agency under the "state action" doctrine. See *Asheville Tobacco Bd. of Trade, Inc.* v. *Federal Trade Commission,* 263 F. 2d 502, 508–510 (C.A. 4); cf. *Gibson* v. *Berryhill,* 411 U.S. 564, 578–579.

No. 73–5845, decided December 23, 1974, slip op. 6. This test, invoked to determine state action for purposes of the Fourteenth Amendment, is not without relevance here.

The theory of the state action limitation of *Parker* v. *Brown* is that Congress did not intend the Sherman Act to reach action taken by the states in their sovereign capacity. Whether particular conduct constitutes "state action" for this purpose, however, turns on whether the state has affirmatively required the conduct. See, *e.g., Asheville Tobacco Bd. of Trade, Inc.* v. *Federal Trade Commission,* 263 F. 2d 502, 508–510 (C.A. 4); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.,* 424 F. 2d 25 (C.A. 1), certiorari denied, 400 U.S. 850; *New Mexico* v. *American Petrofina, Inc.,* 501 F. 2d 363, 369–370 (C.A. 9). The question is "whether the anti-competitive result actually is a goal of the state entitled to the state's immunity rather than a private group masquerading under the banner of 'state action.'" *Id.* at 369.

Here, the state was not involved to the extent of making the anticompetitive conduct a mandatory requirement. The court of appeals recognized that the Supreme Court has not specifically approved or disapproved the schedules in question (Pet. App. B–11), but found sufficient active supervision by that court to satisfy *Parker* under the rationale of its earlier interpretation of *Parker* in *Washington Gas Light Co.* v. *Virginia Elec. & Power Co.,* 438 F. 2d 248 (C.A. 4). In that case the court of appeals held that a regulatory agency's failure to disapprove acts by those regulated supports an inference that "silence

means consent" and hence establishes the state involvement required by *Parker*. *Id.* at 252. We submit that this analysis, which the Fifth Circuit [29] and the court in *Oregon Bar* refused to follow (Pet. Br. App. B-12), is unsound.

There is a sharp distinction between regulatory authority that permits, or fails to prohibit, particular restraints on competition, and state action requiring particular conduct. Cf. *United States* v. *Borden Co.*, 308 U.S. 188, 198–201. This distinction is highlighted in the Court's recent holding that a utility (like that involved in *Washington Gas Light*) was not engaged in "state action" when it terminated service to a nonpaying customer (*Jackson* v. *Metropolitan Edison Co.*, *supra*, slip op. at 12; emphasis supplied):

> The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, *where the Commission has not put its own weight on the side of the proposed practice by ordering it*, does not transmute a practice initiated by the utility and approved by the Commission into "state action."

Similarly, this Court has long held that conduct merely authorized, but not commanded, by a regulatory statute is not exempt from the antitrust laws.

[29] See *Gas Light Co.* v. *Georgia Power Co.*, 440 F. 2d 1135, 1139–1140 (C.A. 5), certiorari denied, 404 U.S. 1062.

United States v. *Radio Corp. of America*, 358 U.S. 334, 350–351; *California* v. *Federal Power Commission*, *supra*, 369 U.S. at 485; *United States* v. *Philadelphia Nat'l Bank*, *supra*, 374 U.S. at 352; *Otter Tail Power Co.* v. *United States*, *supra*, 410 U.S. at 373–375.) This distinction is made clear by *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690. There the Court rejected a private party's claim that its status as exclusive purchasing agent for the Canadian government brought it within the exemption of *Parker* v. *Brown*, because there was no indication that any Canadian government official had "directed" the defendant to engage in the anticompetitive conduct (*id.* at 706) or that Canadian law "compelled" such conduct. *Id.* at 707.

Numerous enterprises in the American economy are closely regulated because they involve essential services affected with a public interest. But this does not transmute them into "state actors in all their actions." *Jackson* v. *Metropolitan Edison Co.*, *supra*, slip op. at 8. "Doctors, optometrists, lawyers, Metropolitan [Edison] and * * * [a] grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State." *Id.* at 8–9. Thus, the Fourth Circuit has erred in assuming that under *Parker v. Brown* the existence of a general scheme of state regulation, of itself, exempts all supervised activity from the Sherman Act.[30]

[30] Moreover, even a general statutory scheme by which competitors regulate themselves is subject to the principle that

There is no evidence here that minimum fixed fee schedules were required either by the Virginia legislature or the Supreme Court. Because the Supreme Court is not a regulatory agency, its supervisory duty has been confined to the decision of individual cases and to the implementation of the broad guidelines established by the Virginia legislature. Those guidelines specifically require that, in its oversight of the bar, the court not adopt rules "inconsistent with any statute * * *." Va. Code 54-51. The court of appeals' reasoning misconceives the role of the Supreme Court and fails to recognize that the existence of some degree of governmental oversight or involvement does not itself make *Parker* applicable. See *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc., supra,* 424 F. 2d at 30; *Hecht* v. *Pro-Football, Inc.,* 444 F. 2d 931, 935 (C.A.D.C.); *United States* v. *Pacific S.W. Airlines,* 358 F. Supp. 1224 (C.D. Cal.)

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collective restraints imposed thereunder are not exempt from the antitrust laws unless they are essential to achievement of the objectives of the statutory scheme, and are no more restrictive than necessary. *Silver* v. *New York Stock Exch., supra,* 373 U.S. at 361. This principle is not properly applicable to determine whether a case involves state action under *Parker* v. *Brown.* It has been invoked, however, to determine whether state and federal law may be reconciled, without one or the other being completely ousted. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, 127. No question of irreconcilable conflict between state law and the Sherman Act was decided in *Parker,* nor is it presented with respect to the Virginia regulatory plan for lawyers. If it were, we submit that, under the test of *Silver* and *Merrill Lynch,* collective price fixing under such a statutory scheme is neither essential for regulation of the bar (see supra, pp. 15–20), nor the least restrictive alternative for prevention of abuses in fee determination.

That the State Bar functions as an administrative agency of the Virginia court for the purpose of enforcing the court's rules for governance of the Bar does not convert every action the State Bar takes into a command of the court. No court rule requires it to propose or enforce local minimum fixed fee schedules. Its members, on the other hand, are directly and personally interested in fee levels. The State Bar exercised a private initiative, not required by statute or court rule, when it proposed schedules and determined that habitual failure to adhere to them would constitute unethical conduct.

A similar conclusion was reached in *United States* v. *Oregon State Bar, supra.* An Oregon statute declared the state bar to be an agency of the state for the purpose of carrying out the provisions of the state integrated bar law, and also to be "a public corporation and an instrumentality of the Judicial Department" of the state's government (Pet. Br. App. B2). After finding that the Oregon bar was composed of private attorneys, that no state statute authorized fixed fee schedules, and that the schedules were not the product of a disinterested state agency, the district court held that "the substantial state direction and involvement required to meet the legislative mandate requirements [of *Parker*] and to elevate these Oregon State Bar activities to the plateau of 'state action' immunity" were lacking (*id.* at B9). The same reasoning applies here.

A different, and more difficult,[31] case might be presented if the Supreme Court or some other independent public agency of the state, acting under explicit statutory authorization, required attorneys to adhere to fixed fee schedules.[32] But since the fee schedules

[31] On this record, the Court need not consider the extent to which a state requirement for price fixing among lawyers might be inconsistent with the Sherman Act. In *Parker* the Court stated that "[a] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful" (317 U.S. at 351), and that a state cannot become a "participant in a private agreement or combination by others for restraints of trade." *Id.* at 351–352. Citing *Parker*, the Court has also observed that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 389.

[32] For example, in the early history of this country several states adopted laws directly interfering with competitive forces in the market for legal services, in that they established maximum levels for fees. See II Chroust, *supra*, at 232–277.

Similarly, under the statute governing English solicitors, minimum remuneration for "no-contentious" business (business for which a tribunal cannot tax solicitors' fees as costs), is regulated by orders issued under the Solicitors' Act, 1957, as amended, 5 & 6 Eliz. 2, ch. 27, Sec. 56. These orders are made not by a private organization but by a committee consisting of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Law Society (the English equivalent of a bar association), the president of a provincial law society, and, so far as concerns business relating to land registry, the Chief Land Registrar. Moreover, the orders are statutory instruments that can be annulled by either house of Parliament, 36 Halsbury's *Laws of England*, Solicitors ¶ 142, p. 107 (3d. ed. 1961). Litigated business is subject to taxation of costs having regard to skill, labor, and responsibility, except where there is an agreement of the parties. Such agreements do not affect rights or remedies for recovery of costs payable by any person other than the client, and agreements for excessive

were not authorized by any state statute, were not required by the Supreme Court, and were not promulgated by an independent and disinterested state body, and since the public had no voice in their establishment, the elements for immunity defined in *Parker* are absent. Because, as in the *Oregon Bar* case, *supra,* the minimum fixed fee schedules were not a product of a valid command of the state and were not established by independent state officials, *Parker* is inapplicable.[33]

amounts may be referred by the costs taxing officer to the tribunal, which can reduce the amounts. *Id.* at 122–129.

A barrister's fees are fixed by his clerk through negotiation with his instructing solicitor. Kiralfy, *The English Legal System* 288 (5th ed. 1973). English barristers are now regulated by a General Council of the Bar, consisting of the Attorney General, the Solicitor General, the chairman of the Council and elected barristers. A rule setting an absolute minimum fee for Queen's Counsel and juniors, respectively, was abrogated in 1967. 3 Halsbury's *Laws of England*, Barristers, ¶ 54, p. 40, n. *l.* (3d ed. 1953, 1972 Supp.).

[33] In view of this Court's denial of the State Bar's motion to dismiss, we do not address in detail the State Bar's contention concerning the Eleventh Amendment. Since the State Bar is not the *alter ego* of the State of Virginia, nor a state agency in any relevant sense (see p. 40, *supra*, n. 28), a judgment—even for money damages—against the State Bar, which has its own funds (see p. 38, *supra*), would not be equivalent to a judgment against the state. Accordingly, the Eleventh Amendment does not immunize the State Bar from a suit against it in the federal courts. See generally *Edelman* v. *Jordan*, 415 U.S. 651, 668–671. To hold that under the Eleventh Amendment the State Bar is immune from suit in federal court would in effect be to hold it immune from liability for violations of the antitrust laws, for suits to enforce those laws may be brought only in federal courts. See 15 U.S.C. 4, 15.

The district court having severed the questions of liability and damages, neither court below has definitively ruled on

Paraphrasing *Metropolitan Edison,* even if lawyers in Virginia could be regarded as being "heavily regulated * * *, enjoying at least a partial monopoly" in the providing of legal services within the state, and if a state agency had found their challenged actions to be "permissible under state law," that would not sufficiently connect the state with those actions as to make them attributable to the state for purposes of the Sherman Act. Slip op. at 13.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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whether or to what extent either respondent might be liable in damages to the petitioners or to other members of the class they represent. It is therefore premature for this Court to consider issues relating to damages, such as whether a nonretroactive imposition of liability would be warranted. Compare *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105–109; *Simpson* v. *Union Oil Co.*, 396 U.S. 13, 14. The pendency of the damage claims, however, coupled with petitioners' request for a declaratory judgment, means that, even if injunctive relief is no longer required against either the Association (because it has now withdrawn the challenged schedule) or the State Bar (*e.g.*, because of immunity), the case is not moot. Cf. *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115.

APPENDIX

[Filed Dec. 19, 1974, James F. Davey, Clerk]

United States District Court for the District of Columbia

Civil Action No. 2412–72

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, DEFENDANT

Opinion

This is an antitrust suit brought by the United States against the National Society of Professional Engineers (NSPE) under § 1 of the Sherman Act, 15 U.S.C. § 1, which declares illegal every "contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States. * * *" The alleged offense centers on Section 11(c) of defendant's Code of Ethics which prohibits members of NSPE from submitting competitive bids for their engineering services.[1] Plaintiff seeks to enjoin the combination and conspiracy which maintains the prohibition against competitive bidding as well as to have canceled all provisions to the Code of Ethics and other relevant rules or statements of policy which support the bidding ban.

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[1] Section 11(c) provides:

"Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or

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NSPE is a professional society incorporated under the laws of South Carolina with more than 69,000 members located throughout the United States. Membership in NSPE accounts for slightly less than 10 percent of all graduate engineers in the nation holding a collegiate degree in engineering from an institution of higher learning. Upon a demonstration of proficiency, each of the states permits engineers to hold a certificate of registration or license to practice. Approximately 325,000 are so registered of whom 55,000 or 17 percent, are members of NSPE. About half of the registered professional engineers in this country are engaged in offering services to the public as consulting engineers. Although NSPE is a national organization, it is affiliated with professional engineering societies in each of the 50 states, territories and the District of Columbia. When a member joins NSPE,

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advancement or professional engagements by competitive bidding * * *

"c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professionals."

he joins the applicable state society and local chapter at the same time.

Defendant's Board of Directors adopted the present format of the NSPE Code of Ethics in 1964. Section 11(c) of the Code provides that an engineer "shall not solicit or submit engineering proposals on the basis of competitive bidding." The section defines competitive bidding as any measure of compensation "whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer * * * has been selected for negotiations." While Sec. 11(c) advises that disclosure of a recommended state society fee schedule does not constitute competitive bidding, it requires that the engineer "withdraw from consideration for the proposed work" if the prospective client insists on competitive bidding.

In practice, adherence to Sec. 11(c) by the engineer and client means the prospective client will limit his initial search to the engineer whose background and reputation suggests he is the best qualified and most appropriate for the client's needs. Discussion of fees, however, will not be permitted until after the client has actually selected an engineer and discussed the scope of his particular problem. Should the engineer and client be unable to agree upon a satisfactory fee arrangement, the client will withdraw his selection and approach a new engineer. This procedure is known as the traditional method of retaining professional engineering services.

In addition to the Code of Ethics, the defendant has sought to promote its ban on competitive bidding by a variety of other means. These include publication of professional policy statements, issuance of opinions on a case analysis basis by its Board of Ethical Review, distribution of pamphlets to members and clients, personal letters to individual clients suspected of

soliciting on a competitive bid basis, and participation with other professional societies in preventing governmental agencies from obtaining price proposals for architect-engineering (A–E) projects by competitive bidding methods.

While NSPE has no authority to terminate an engineer's membership in his state society for unethical conduct, it has played a significant role in coordinating and encouraging state society investigations into suspected misconduct. NSPE has recommended procedures to be followed by state societies upon the filing of charges of unethical conduct against a member, assisted in the conduct of these investigations, and directly warned members of apparent Sec. 11(c) violations.

The policing actions of defendant with respect to Sec. 11(c) have met with apparent success. The record is devoid of any evidence suggesting significant defections by members from the bidding ban. Attempts by at least one federal agency to exchange the traditional method of procuring A–E services for competitive bidding met strong resistance resulting in part from actions of NSPE urging its members to refuse to offer their services.

The nature of engineering services provided by NSPE members covers a wide spectrum embracing the study, design and construction of real property improvements located throughout the United States and abroad. Engineering services include pre-feasibility studies, feasibility studies, planning, preliminary studies, the preparation of drawings, plans, designs, specifications, cost estimates, manuals, and reports, consultations, surveys, and inspections. This work is performed in connection with myriad projects ranging from highway construction, public utilities and communications facilities to commercial structures, transportation means and mining facilities. The list is virtually endless. The clients for whom NSPE members offer their services include governmental agencies at all levels, manufacturing companies, industrial companies and retailing companies operating throughout the United States.

NSPE members practice as sole practitioners, partnerships and corporations ranging upwards in size to 1500 individuals. Individual members are often licensed to perform engineering services in several states at one time. Engineering firms with which NSPE members are affiliated frequently maintain offices in states and foreign countries other than their principal places of business. Such firms perform services on a multi-state, regional or national basis.

Most design and construction projects require the services of both architects and engineers whose services are often provided by a single firm. The engineer's portion of the firm's fee normally accounts for about 5 to 6 percent of the cost of construction. For the year 1972, the 438 largest A–E design firms accounted for approximately $2.2 billion in fees. Profit margins for many firms range as high as 10 to 12 percent. Forty, or approximately 9 percent, of the top 438 A–E design firms were publicly held corporations or affiliated with publicly held corporations, whose fees accounted for approximately 14 percent of the receipts from this group.

In addition to A–E design firms, there is a second significant group of firms performing engineering services known as design/construct firms which differ from typical consulting engineering firms in their added capability of performing construction work as well as traditional A–E design work. In 1972, 30, or

approximately 48 percent, of the top 62 design/construct firms in the nation were publicly held corporations or affiliated with such corporations and accounted for 65 percent of the $26 billion of new project contracts awarded this group.

The Government attacks defendant's ethical prohibition against competitive bidding on grounds it constitutes price fixing in *per se* violation of § 1 of the Sherman Act. Claiming that Sec. 11(c) operates to deny clients access to competitive price information, plaintiff contends the bidding ban illegally tampers with the price structure of engineering services by eliminating all forms of price competition thereby stabilizing engineering fees. NSPE proffers a three pronged defense contending first, the practice of professional engineering is not trade or commerce within the scope of § 1; second, the ethical prohibition is a reasonable practice in the field of professional engineering; third, the practice of professional engineering is exempt from antitrust attack because it is a state regulated profession. The Court will consider these defenses *seriatim*.

Defendant claims that the practice of professional engineering falls outside the ambit of trade or commerce because it is a so-called "learned profession" governed by self-regulation. The notion that learned professions are not covered by the Sherman Act has its genesis in the construction placed upon the term "restraint of trade" under § 3 of the Sherman Act by the Supreme Court in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 436 (1932). In giving expansion to the word "trade", the Court quoted with approval from now famous dictum set down by Mr. Justice Story in *The Schooner Nymph*, 1 Sumn. 516, 517–518; 18 Fed. Cas. 506, 507, No. 10,338 (1834):

> Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade.

Notwithstanding this favorable reference to an early nineteenth century conception of trade, the Supreme Court has never held that a learned profession is exempt from the Sherman Act and has in fact affirmed its intention not to "intimate an opinion on the correctness of the application of the term [trade] to the professions." *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 491–2 (1950).[2] The only circuit court to declare a learned profession exemption was the Fourth Circuit in *Goldfarb* v. *Virginia State Bar*, 497 F. 2d 1 (1974). In that case, a divided court held that a legal profession's fee schedule was immune from a § 1 attack because of the applicability of the "learned profession exemption." *Id.* at 15. More recently, however, a federal district court, after giving careful consideration to the entire litany of learned profession cases, arrived at an opposite conclusion finding that the "fee schedule activities of the defendant, Oregon State Bar, are not immune to Sherman

[2] Two cases are generally cited as authority for the learned profession exemption: *Federal Baseball Club, Inc.* v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), where the Supreme Court noted that "personal efforts, not related to production, is not a subject of commerce." *Id.* at 209; *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931), where the Court stated that "medical practitioners * * * are not in competition with respondent. They follow a profession not a trade. * * *" *Id.* at 653. Both references to learned professions are dicta and not considered to be a holding by the Court of the Existence of a learned profession exemption to the Sherman Act. For a discussion of these cases as precedent for a learned profession exemption, see opinion of Judge Craven (dissenting in part) in *Goldfarb* v. *Virginia State Bar*, 497 F. 2d 1, 23–24 (1974).

Act attack * * * by the 'learned profession' exemption." *United States* v. *Oregon State Bar,* Civil Action No. 74-362 (D.C. or. Nov. 22, 1974).

The concept of a learned profession exception to the antitrust laws is of dubious validity in view of the repeated reluctance of federal courts to recognize it as a legitimate exception to the Sherman Act. The issue of whether a profession is a learned one is not seen by the Court as the appropriate approach for resolving the higher question of whether the Sherman Act is applicable to that profession. To engage in such an inquiry would chart the Court on a semantic adventure of questionable value. It would be a dangerous form of elitism, indeed, to dole out exemptions to our antitrust laws merely on the basis of the educational level needed to practice a given profession, or for that matter, the impact which the profession has on society's health and welfare. Clearly, the more appropriate and fairer course is to examine the nature and conduct involved in the profession on a case by case basis together with the context in which it is practiced.

Congressional intent behind the Sherman Act focused on a desire to prevent restraints to "free competition in business and commercial transactions which tended to * * * raise prices or otherwise control the market to the detriment of purchasers of goods and services. * * *" ***Apex Hosiery Co.*** v. *Leader,* 310 U.S. 469, 493 (1940). The types of business and commercial transactions which Congress intended the Sherman Act to protect have generally been accorded broad recognition by the courts. ***United States*** v. ***National Ass'n of Real Estate Boards, supra,*** (business of real estate broker is trade within the meaning of § 3 of the Sherman Act); ***United States*** v. ***South-Eastern Underwriters Ass'n,*** 322 U.S. 533

(1944) (business of insurance not exempt from operation of the Sherman Act); *American Medical Ass'n* v. *United States,* 317 U.S. 519 (1943) (group health organization engaged in obtaining medical services for its members is conducting trade under § 3 of the Sherman Act). Each of these cases has turned on the character of the restraint and the activity restrained as opposed to a litmus test based on professionality. *Cf. Apex. Hosiery, supra,* at 485. In view of this approach taken by the courts, it can be said at the very least that where the activity of a profession so directly impacts upon interstate trade and commerce as to substantially contribute to the latter's character and direction, it must be concluded that the profession's activity has become subsumed within the general scope of § 1 of the Sherman Act regardless of whether the profession may be characterized as a learned one. As the Supreme Court noted in *South-Eastern Underwriters, supra,* with reference to the language of §§ 1 and 2 of the Sherman Act:

> Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states. 322 U.S. at 553.

The record amply demonstrates that professional engineering is not a metaphysical pursuit but rather a conduit through which abstract scientific principles are reduced to a level of practical application in response to a given problem. In this sense, professional engineering offers a service. And with respect to design engineers who prepare plans and specifications for real property improvements and articles of manufacture, professional engineering also offers a product. Unlike the lawyer's brief or the scholar's text

which convey thought, an engineer's blueprints constitute a necessary physical tool which when combined with standardized techniques of manufacturing and construction, yield a final, functional reduction to practice. In this regard, professional engineering enjoys a maximum interface with end products of construction and manufacture.

The business nature of professional engineering firms is clearly established in the record. It is an industry often organized on a local, regional, national and even international scale controlling, guiding and shaping the pace and direction of the vast array of interstate transactions needed to carry out much of the nation's construction and manufacture. Fully 50 to 80 percent of the cost of constructing and equipping construction projects is controlled by an engineer's work. A substantial amount of equipment and material is transported in interstate commerce at the specific direction of NSPE members. It would not be hyperbole to observe that professional engineering services are at the very backbone of the major portion of the nation's commerce. This is not a case of indirect and insubstantial impact by a so-called learned profession upon interstate commerce. The record is impressive in demonstrating that the imprint of professional engineering upon interstate commerce is clear and unmistakable. It is a driving force of seminal character which continues to forge the very foundation from which our commercial trade emanates. The Court is satisfied in light of the well documented record that the activities of NSPE and its members fall well within the scope of § 1 of the Sherman Act.

II

It is undisputed that price fixing is a *per se* unreasonable restraint of trade under the Sherman Act and

that in such cases it is not for the court to decide whether a particular price fixing activity serves an honorable or worthy end. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *National Ass'n of Real Estate Boards, supra* at 489; *United States* v. *South-Eastern Underwriters Ass'n, supra* at 561. Hence, if the Sec. 11(c) ban on competitive bidding acts to fix the prices of engineering services, the Court's inquiry is ended and it need not consider the reasonableness of the ethical proscription.

In order for conduct to be characterized as price-fixing, it is not necessary to show that the alleged combination or conspiracy has actually pegged prices at a particular level. *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211 (1951). It need only be established that the suspect conduct acts to restrain free price movement. It is the act of tampering with the price structure which is at the core of the offense. As the Court in *Socony-Vacuum* noted:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they * * * stabilized prices they would be directly interfering with the free play of market forces. 310 U.S. at 221.

Accordingly, where the application and practice of a code of professional ethics leaves members of a professional association genuinely free in their pricing decisions, no § 1 offense arises.

Section 11(c) prohibits defendant's members from engaging in any form of price competition when offering their services; selection is restricted to considerations of reputation and ability. No fee information may be given a prospective client which takes the

form of cost estimates or other proposals in terms of dollars, man days of work required, or percentage of construction cost which can be compared to that of another engineer. Section 11(c), however, does permit members to disclose recommended state society fee schedules to prospective clients in the course of the selection process. Moreover, Sec. 9(b) of defendant's Code of Ethics requires its members not to accept work at a fee "below the accepted standards of the profession in the area."[3] As a result of these sections, the only price information available for input into the client's selection equation is a uniformly regular fee schedule. Should the client persist in requiring competitive bids, Sec. 11(c) requires the engineer to withdraw the offer of his service altogether.

Although the actual implementation and enforcement of Sec. 11(c) is not critical to a determination of whether a combination or conspiracy exists to restrain trade, *Socony-Vacuum,* supra at 225, n. 59, the record does support a finding that NSPE and its members actively pursue a course of policing adherence to the competitive bid ban through direct and indirect communication with members and prospective clients. As note *supra,* NSPE has engaged in educational campaigns and personal admonitions to members and clients who were suspected of engaging in competitive bidding practices.

Upon careful review of the pertinent authorities, the Court is convinced that the ethical prohibition

[3] The Sherman Act offenses alleged in the Complaint do not specify activities involving the use of fee schedules by defendant and accordingly the Court does not consider their legality to be at issue in this case. The Court does believe, however, that insofar as the use of fee schedules by defendant's members might affect the impact which Sec. 11(c) has on trade and commerce, an inquiry into their promotion and enforcement by defendant is plainly relevant.

against competitive bidding is on its face a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act. It is not important to know what effect the Sec. 11(c) prohibition has on the price of professional engineering services. *Kiefer-Stewart Co.* v. *Seagram & Sons, supra* at 213. What is of critical significance is that the agreement among defendant's members to refrain from competitive bidding is an agreement to restrict the free play of market forces from determining prices to sacrifice freedom in pricing decisions to market stability. The combination becomes a *per se* illegal one under § 1 of the Act when it tends to "cripple the freedom of traders and thereby restrain[s] their ability to sell in accordance with their own judgment." *Kiefer-Stewart, Ibid.* By proscribing competitive bidding, Sec. 11(c) has as its purpose and effect the excision of price considerations from the competitive arena of engineering services. The ban narrows competition to factors based on reputation, ability, and a fixed range of uniform prices. The prospective client is thus forced to make his selection without all relevant market information. The Sec. 11(c) ban on competitive bidding is in every respect a classic example of price-fixing in violation of § 1 of the Sherman Act.

III

Action to regulate trade undertaken by state officials pursuant to state legislative command is not governed by the Sherman Act. *Parker v. Brown,* 317 U.S. 341 (1943). In *Parker,* a producer and packer of raisins challenged a California law which authorized the establishment, through state officials, of marketing programs for state produced agricultural products. The purpose of the legislation was to stabilize prices by restricting competition in order to "conserve

the agricultural wealth of the State" and "prevent economic waste in the marketing of agricultural products." *Id.* at 346. The Court in *Parker* held:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. *Id.* at 350–51.

Defendant has cited statutes in 16 states which prohibit fee bidding by engineers. It is defendant's position that because Sec. 11(c) coincides with state law, the *Parker* doctrine of state action immunity shields defendant from Sherman Act liability. The Court finds this extension of *Parker* unacceptable for several reasons.

The state program in *Parker* comprised a carefully legislated administrative plan for trade regulation which insured continuous state supervision through the offices of a state created commission. It was not a case where agricultural growers had been allowed to restrain trade in contravention of the antitrust laws by mere legislative fiat. The Court emphasized this point by noting:

> [A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. * * *" *Id.* at 351.

Likewise, the First Circuit observed in *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25, *cert. denied*, 400 U.S. 850 (1970):

> The [Parker] Court's emphasis on the extent of the state's involvement precludes the facile conclusion that action by any public official automatically confers exemption. * * * Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition

> is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation." *Id.* at 30.

The instant Complaint charges defendant with illegal restraint of trade on a nationwide basis. It does not attack the action of any state official or agency. Unlike the situation in *Parker,* the challenged activity of NSPE and its members was a private conspiracy in restraint of trade and not conducted pursuant to the command of any state legislature. There is no evidence of any state enforcement machinery, present in *Parker,* which suggests that when the 16 states decided to prohibit competitive bidding they also intended to establish an alternate form of public regulatory control. Defendant's activities are plainly interstate in nature, unencumbered by the regulations of individual states. The extrapolation of *Parker* urged by defendant is both unfounded in logic as well as in law. The doctrine of state immunity enunciated by the Court in *Parker* simply has no applicability to a code of ethics which has been formulated outside the command and supervision of a state agency.

For the reasons stated *supra,* the Court finds that promulgation and enforcement of Sec. 11(c) by NSPE, its members and state societies, constitutes a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of § 1 of the Sherman Act.

Findings of Fact and Conclusions of Law are annexed hereto.

JOHN LEWIS SMITH, JR.,
United States District Judge.

DECEMBER 19, 1974.

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In The

SUPREME COURT of the UNITED STATES

October Term, 1974

No. 74-70

LOUIS H. GOLDFARB and
RUTH S. GOLDFARB,

Petitioners,

v.

VIRGINIA STATE BAR and FAIRFAX
COUNTY BAR ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS, FOURTH CIRCUIT

BRIEF AND APPENDIX OF THE STATE BAR OF WISCONSIN AS AMICUS CURIAE

For the State Bar of Wisconsin

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BRIEF OF THE STATE BAR OF WISCONSIN AS AMICUS CURIAE

Letters from attorneys for all parties consenting to the filing of this brief are on file with the clerk.

OPINION BELOW

The opinion of the United States Court of Appeals, Fourth Circuit, is reported in 497 Fed. (2) 1.

QUESTION PRESENTED

Does the Sherman Anti-Trust Act apply to an integrated State Bar fee schedule or to the fee schedules of voluntary bar associations?

INTEREST OF THE STATE BAR OF WISCONSIN AS AMICUS CURIAE

The State Bar of Wisconsin like the Virginia State Bar is an integrated bar although created by state action pursuant to order of the Supreme Court of Wisconsin acting under its inherent power rather than by legislative act as in Virginia. See *Lathrop v. Donahue* (1961) 367 U. S. 820, for the history and structure of the State Bar of Wisconsin, and its validity.

Unlike the Virginia State Bar the State Bar of Wisconsin does not now have and does not propose to adopt any fee schedule either compulsory or voluntary relating to the general practice of law. However, the State Bar of Wisconsin is very deeply concerned with the adverse effect of a possible reversal of the decision of the United States Court of Appeals for the Fourth Circuit in that a holding to the effect that a State Bar is subject to the price fixing provisions of the Sherman Anti-trust Act would seriously jeopardize the efforts of the State of Wisconsin in discharging the duty of the profession to deliver adequate legal services to the public at reasonable rates through the medium of Group and Prepaid Legal Service plans providing a schedule of benefits and fees.

While the State Bar of Wisconsin has no immediate interest in that part of the decision below relating to fee schedules of voluntary bar associations such as the Fairfax County Bar Association here, it does strongly subscribe to the holding of the lower court that the practice of a learned profession such as the law is neither trade or commenrce and that restraints upon such practice are not per se violative of the Sherman Act. However, this

brief will not be addressed to that subject but will be confined to that part of the decision relating to State Bar fee schedules and how the reversal of the lower court decision will destroy the professional duty of the bar to provide services to the public at reasonable rates through Group and Prepaid Legal Service plans such as are contemplated by the State Bar of Wisconsin pursuant to rules of the Supreme Court of Wisconsin promulgated on November 29, 1972, effective December 7, 1972, published in 55 Wis. (2) xi-xiii, a copy of which is set forth in this brief as Appendix A, and as implemented by Minimum Standards for Group and Prepaid Legal Service Plans adopted by the Board of Governors of the State Bar of Wisconsin on September 21, 1973, a copy of said standards being attached to this brief as Appendix B.

SUMMARY OF ARGUMENT

The State Bar of Wisconsin takes the position that the judgment of the United States Court of Appeals, Fourth Circuit, should be affirmed because:

1. There is nothing in the Sherman Act which requires it to be so interpreted as to deprive the public of the right to receive legal services under a state plan promoting the delivery of legal services at the lowest possible cost in accordanc with pre-arranged schedules of benefits and costs.

2. The United States Supreme Court has indicated its approval of attorney fee fixing for legal services at reasonable rates to organized public interest groups.

3. The public as well as the legal profession has the right to know the customary fee charged for legal services.

ARGUMENT

I.

THERE IS NOTHING IN THE SHERMAN ACT WHICH REQUIRES IT TO BE INTERPRETED IN SUCH A WAY AS TO DEPRIVE THE PUBLIC OF THE RIGHT TO RECEIVE LEGAL SERVICES UNDER ANY STATE PLAN WHICH WILL PERMIT THE LEGAL PROFESSION TO DELIVER SUCH SERVICES AT THE LOWEST POSSIBLE COST IN ACCORDANCE WITH PREARRANGED SCHEDULES OF BENEFITS AND COSTS

As indicated above the interest of the State Bar of Wisconsin in this appeal arises out of its concern that if the decision of the Fourth Circuit is reversed and the Sherman Act is held to be applicable to the fee schedules of an integrated bar the result could place in grave jeopardy any program promoted by the profession and the courts such as Group or Prepaid Legal Service plans providing a schedule of prearranged benefits and fees.

That such a fear is not an idle one is amply demonstrated by the fact that representatives of the Anti-Trust Division of the United States Department of Justice have publicly announced not just once but a number of times their determination of prosecuting bar associations whose Group and Prepaid Legal Service plans do not meet with their approval in one way or another.

It is unnecessary to go into the details here but the controversy is set forth at some length in articles in the American Bar Association Journal, such as the following:

1. "Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing before the Tunney Subcommittee", July, 1974, Vol. 60, p. 791 and ff.

2. "Justice Department Continues Its Contentions that the Houston Amendments Raise Serious Anti-Trust Problems", November, 1974, Vol. 60, p. 1410 and ff.

3. "The Prepaid Legal Service Picture", December, 1974, Vol. 60, p. 1545.

Also as appears in the November, 1974, issue of the American Bar Association Journal at page 1411, the Justice Department has filed a number of suits against various professional organizations including a challenge to the use of minimum and suggested fee schedules by the Oregon State Bar.

The Justice Department has proposed to draw distinctions betwen so-called "open" and "closed" plans of delivery of legal services to the public. Who knows what distinctions they may attempt to enforce upon the legal profession tomorrow?

The inherent power and responsibility for the regulation of the practice of law belongs to the judicial rather than to the legislative department of government.

In re Cannon (1932) 206 Wis. 374, 240 NW 441

Integration of Bar Cases

(1943) 244 Wis. 8, 11 NW (2) 604

(1946) 249 Wis. 523, 25 NW (2) 500

(1956) 273 Wis. 281, 77 NW (2) 604

(1958) 5 Wis. (2) 618, 93 NW (2) 601

Lathrop v. Donahue (1960) 10 Wis. (2) 230, 102 NW (2) 404, affirmed 367 U. S. 820

State ex rel. Reynolds v. Dinger (1961) 14 Wis. (2) 193, 109 NW (2) 685

State ex rel. State Bar v. Keller (1961) 16 Wis. (2) 377, 114 NW (2) 685, 21 Wis. (2) 100, 123 NW (2) 905, cert. denied 377 U. S. 964

State ex rel. State Bar v. Bonded Collectors (1967) 36 Wis. 2) 643, 154 NW (2) 250, 27 ALR (3) 1138

State ex rel. Baker v. County Court (1965) 29 Wis. (2) 1, 138 NW (2) 162, 19 ALR (3) 1089

This is a point that cannot be stressed too strongly. It is true as was said in the case of *In re Greathouse* (1933) 189 Minn. 51, 248 NW 735, 737, that the judicial power of the courts has its origin in the constitution, but when a court comes into existence, it comes with inherent powers.

The three great departments of government being made separate and independent of one another precludes the idea that the legislative department may embarrass the judiciary by regulating the practice of law and such an intent should not be inferred in the absence of express constitutional provision.

In re Cannon (1932) 206 Wis. 374, 397, 240 NW 441

As was said in this case at page 379:

"We do not fail to appreciate the delicacy in considering a disputed question involving legislative and

judicial power. We easily subject ourselves to the criticism of usurping power where by our decision the power is committed to the judicial rather than the legislative department of government. However, we may as easily subject ourselves to the criticism of timidity were we to betray a disposition to avoid responsibility. The usurpation of power is not more culpable than the abdication of responsibility."

A reversal of the decsion of the Fourth Circuit here so as to place the subject of fees for the professional services of lawyers under the aegis of the Anti-Trust Division of the Justice Department is the invitation to the dance so far as surrender of the regulation of law to a vast federal bureaucracy is concerned.

As the lower court so ably pointed out in quoting at page 19 from *Unted States v. Cooper Corporation* (1941) 312 U. S. 600, 606, it is not for the courts to indulge in the business of policy-making in the field of anti-trust legislation, and that in effect the Goldfarbs are urging the court to indulge in judicial legislation.

II.

THE UNITED STATES SUPREME COURT HAS IMPLIEDLY GIVEN ITS APPROVAL TO ATTORNEY FEE FIXING

While the case of *United Transportation Union v. State Bar of Michigan* (1971) 401 U. S. 576 was not an anti-trust case, it is nevertheless very significant from the standpoint of its implications here.

The Michigan State Bar sought to enjoin the members of a railroad union from solicitation of personal injury litigation in cases where attorneys had agreed on maximum 25% attorney fees. The stated purpose of the union was to assist their fellow workers, their widows and families, to protect themselves from excessive fees at the hands of incompetent attorneys in suits for damages under the Federal Employers' Liability Act.

The question of the propriety of a fixed reasonable attorney's fee appears to have carried considerable weight as is evidenced by the following language from the majority opinion at page 585:

> ". . . It is hard to believe that a court of justice would deny a cooperative union of workers the right to protect its injured members, and their widows and children, from the injustice of excessive fees at the hands of inadequate counsel. . . ."

Thus, the principle of an agreement fixing attorney fees was accepted by the court as well as by counsel. It is indeed difficult to believe that the applicability of the Sherman Act to such fee fixing would have been entirely

overlooked by the court and the contesting parties if, in fact, there is any substance to the suggestion that lawyers involved in widespread fee fixing agreements are violating the Sherman Act.

III.

THE PUBLIC AS WELL AS THE LEGAL PROFESSION HAS A RIGHT TO KNOW THE CUSTOMARY FEE CHARGED FOR DELIVERY OF LEGAL SERVICES

Under Canon 2 of the Code of Professional Responsibility, DR 2-106 (B) (3) of the American Bar Association, one of the factors to be considered in determining the reasonableness of a fee is the fee customarily charged in the locality for similar legal services. This Code has been adopted by many state bars and is binding upon the members of the State Bar of Wisconsin by Supreme Court order. [43 Wis. (2) xiii-Lxxvi].

The customary fee standard is not only sanctioned by the Code of Professional Responsibility but it has also found its way into the statute law as in provisions allowing recovery of attorney fees in suits brought under Consumer Acts. For example, in consumer transaction litigation when the customer prevails under Sec. 425.308 (2) (b) Wis. Stats., it is provided that in determining the amount of the fee the court may consider among other things, "The customary charges of the bar for similar services."

How in the world is the public, the courts, and indeed the legal profession to know what the customary charges

of the bar are for similar services in the absence of a fee schedule?

Certainly the Sherman Act on its face is subject to no such construction as is urged by the Goldfarbs, and if by some process of tortured construction it is so interpreted, we then are led to the conclusion as stated in *United Transportation Union,* supra, page 581, that if a statute upon its face abridges rights guaranteed by the First Amendment, it should be struck down.

CONCLUSION

For the reason stated, the judgment of the United States Court of Appeals herein should be affirmed.

For the State Bar of Wisconsin

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APPENDIX A

August Term, 1972

STATE OF WISCONSIN — IN SUPREME COURT

In the matter of the Creation of a Rule for Registration of GROUP LEGAL SERVICES

Upon the petition of the State Bar of Wisconsin requesting this court to adopt a rule clarifying the rights and duties of attorneys involved in any form of group legal service arrangements and to require the registration of all such persons, a hearing was had and consideration given; and the court believing a rule should be created governing such matters, now therefore,

IT IS ORDERED that effective on publication of this order the rule known as section 256.294 of the statutes is created as follows:

"256.294 GROUP LEGAL SERVICES (1) The furnishing of legal services by a member of the State Bar pursuant to an arrangement for the provision of such services to the individual member of a group, as herein defined, at the request of such group, is not of itself in violation of the Rule of Professional Responsibility prohibiting solicitation and like activities if the arrangement:

(a) permits any member of the group to obtain legal services independently of the arrangement from any attorney of his choice, and

(b) is so administered and operated as to prevent all of the following:

1. Such group, its agents or any member thereof from interfering with or controlling the performance of the duties of such member of the State Bar to his client; and,

2. Such group, its agents or any member thereof from directly or indirectly deriving a profit from or receiving any part of the consideration paid to the member of the State Bar for the rendering of legal services thereunder; and,

3. All publicity and solicitation activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the group, or the nature and extent of the legal services, or both.

(2) Nothing in this section shall prohibit a statement in response to individual inquires as to the identity of the member or members of the State Bar rendering or to render the services, giving the name or names, addresses and telephone numbers of such member or members.

(3) As used in this section, a "group" means a professional association, trade association, labor union or other non-profit organization, or combination of persons incorporated or otherwise whose primary purposes and activities are other than the rendering of legal services, and shall include groups furnishing legal services to indigent individuals on other than a fee basis.

(4) A member of the State Bar furnishing legal services pursuant to an arrangement shall advise the State Bar thereof within sixty days after entering into the same. Thereafter he shall register with and advise the State Bar, on forms provided by it, and within thirty days of receipt of such forms, of the following matters: the name of the group, its address, whether it is incorporated, its primary purposes and activities, the number of its members and a general description of the types of the legal services offered pursuant to the ar-

rangement. He shall annex to and include any fee schedule. Annually, on or before January 31, he shall report to the State Bar, on forms provided by it, the number of members in the group to whom legal services were rendered during the calendar year, and amendments to the plan, including changes in the fee schedule, during such preceding year.

All information filed pursuant hereto, except the name and address of the group, the fact that it has an arrangement for the provision of legal services and the names of members of the State Bar providing such services, shall be confidential; providing such registrations and reports shall be available to appropriate representatives of the supreme court and the State Bar for information purposes and for disciplinary and ethical investigations or proceedings.

(5) Failure to make and file a timely registration or report as to a group arrangement as required herein shall constitute unprofessional conduct and grounds for disciplinary action."

IT IS FURTHER ORDERED that notice of the adoption and promulgation of this rule be given by publication of this order in the official state paper and in the Wisconsin Bar Bulletin.

Dated at Madison, Wisconsin, this 29th day of November, 1972.

By the Court:

/s/ ARDIS KIRKPATRICK
Ardis Kirkpatrick
Deputy Clerk of Court

APPENDIX B

MINIMUM STANDARDS FOR GROUP AND PREPAID LEGAL SERVICE PLANS

The Board of Governors of the State Bar of Wisconsin on September 21, 1973, approved the following standards to be met by all plans through which attorneys furnish group or prepaid legal services in Wisconsin:

1. The entire plan shall be reduced to writing and a description of its terms shall be distributed to the members or beneficiaries thereof;

2. The plan and description shall:

(a) State clearly and in detail the benefits to be provided, exclusions therefrom and conditions thereto;

(b) Describe the extent of the undertaking to provide benefits and reveal such facts as will indicate the ability of the plan to meet the undertaking;

(c) Provide that there shall be no infringement upon the independent exercise of the professional judgment of any lawyer furnishing service under the plan;

(d) Specify that a lawyer providing legal service under the plan shall not be required to act in derogation of his professional responsibilities; and

(e) Set forth procedures for the objective review and resolution of disputes arising under the plan;

3. There shall be a periodic written report not less often than annually disclosing to members or beneficiaries of the plan and to the State Bar of Wisconsin

a summary of the operations of the plan including, but not limited to, all relevant financial data, the number of members or beneficaries receiving legal services, and the kinds of benefits provided;

4. Each plan should provide for an advisory group including members of the bar and beneficiaries of the plan which shall meet periodically to review and evaluate the organization and operation of the plan and to offer suggestions for its improvement.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB,
Individually and as Representatives of the
Class of Reston, Virginia Homeowners,
Petitioners,

v.

VIRGINIA STATE BAR and FAIRFAX COUNTY
BAR ASSOCIATION,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE BAR OF TEXAS

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In The

Supreme Court of the United States

October Term, 1974

No. 74-70

Lewis H. Goldfarb and Ruth S. Goldfarb,
Individually and as Representatives of the
Class of Reston, Virginia Homeowners,
Petitioners,

v.

Virginia State Bar and Fairfax County
Bar Association,
Respondents.

On A Writ Of Certiorari To The United States
Court Of Appeals For The Fourth Circuit

AMICUS CURIAE BRIEF OF THE STATE BAR OF TEXAS

QUESTIONS PRESENTED

This Amicus Curiae respectfully submits that the Questions Presented would be more accurately stated as follows:

1. Does the practice of the learned public profession of law as a licensed member of the Judicial Department of the State under a State Bar statute vesting the governance and regulation of the practice in the Supreme Court of the State to be exercised through the State Bar as an administrative agency constitute "trade or commerce" within the intended application of Section 1 of the Sherman Antitrust Act?

2. Does the performance by a lawyer licensed by and practicing and residing within the State of legal services performed wholly within the State with reference to essentially local matters such as home purchases constitute "trade or commerce among the several states or with foreign countries" within the meaning and application of Section 1 of the Sherman Act?

3. Should minimum fee schedules promulgated by an administrative agency of the Judicial Department of the State in any event be adjudged to violate Section 1 of the Sherman Antitrust Act without any reference to the commerce facts of the particular legal services rendered in individual transactions?

4. Is a minimum fee schedule promulgated by an administrative agency of the Judicial Department of the State with the legal approval of the Supreme Court of the State in the nature of State action which is beyond the ambit and application of the federal antitrust laws?

THE INTEREST OF THE STATE BAR OF TEXAS AS AMICUS CURIAE

The State Bar of Texas desires leave to file this Amicus Curiae Brief in support of the position of the Respondents. Both Petitioners and Respondents have consented to the filing of this Amicus Curiae Brief by letters from their counsel of record to the counsel for the State Bar of Texas which have been filed with the Clerk of the Court.

The State Bar of Texas is a statutory agency of the State of Texas declared by law to be a part of the Judicial Department of the State. The State Bar Act provides that the State Bar, as "an administrative agency of the Judicial Department of the State," shall be governed by a Board of

Directors "composed of the officers of the State Bar, and not more than thirty additional members, elected from geographical Bar Districts by the members of the State Bar." Article 320a, Vernon's Texas Civil Statutes.

The filing of and the positions taken in this Amicus Curiae Brief have been approved by unanimous action of such Board of Directors.

All of the more than 25,000 lawyers licensed by the Supreme Court of Texas are members of the State Bar pursuant to provision of the State Bar Act (Article 320a, *supra*) that "all persons who are now or who shall hereafter be licensed to practice law in this State shall constitute and be members of the State Bar, and shall be subject to the provisions hereof and the rules adopted by the Supreme Court of Texas."

Provision is made for the comprehensive regulation and governance of the practice of law as follows:

> "From time to time, as to the Court may seem proper, the Supreme Court of Texas shall prepare and propose rules and regulations for disciplining, suspending, and disbarring attorneys at law; for the operation, maintenance, and conduct of the State Bar; and prescribing a code of ethics governing the professional conduct of attorneys at law."

Provision is then made for the approval of such rules and regulations by referendum of the membership of the State Bar.

Pursuant to these provisions of the State Bar Act, Article 320a, Vernon's Texas Civil Statutes, *supra,* a comprehensive regulatory scheme governing the State Bar of Texas and its members and regulating the practice of law and the professional conduct of lawyers has been adopted under

such statutory authorities. State Bar Rules and a Code of Professional Responsibility have been approved by the State Bar of Texas and adopted and promulgated by the Supreme Court of Texas.

The State Bar of Texas has officially adopted and promulgated minimum fee schedules now still in effect as an informational guide with it being published thereon:

> "It should be at all times made clear that minimum fee schedules constitute suggestions only as to fees that have generally been found reasonable for particular services. It must be emphasized that such minimum fee schedules are not to be agreed upon and that they are not enforceable. It should be stressed that no attempt will be made to enforce them by disciplinary action, coercion, threats or otherwise. It should also be pointed out that failure to comply with minimum fee schedules does not constitute any violation of the canons of ethics. This statement is in accord with the views expressed by the Antitrust Division of the United States Department of Justice."

The State Bar of Texas is committed to the maintenance of minimum fee schedules and is accordingly vitally interested in clarifying their validity under the Sherman Antitrust Act.*

SUMMARY OF ARGUMENT

Lawyers are officers of the court. Admission to the practice of the profession, rules of practice and standards of conduct, and duties to the court and to the public are governed by the judiciary and not by the antitrust laws.

---

* The antitrust attacks being made on minimum fee schedules imply that they constitute a dangerous recent innovation. They are in fact of more ancient origin than the Sherman Act. One in the archives of the State Bar of Texas adopted by the Belton, Texas Bar Association bears a date of December 11, 1882. The recent innovation is the antitrust attack on their long unquestioned validity.

The Virginia State Bar, like the State Bar of Texas, is a statutory agency of the Judicial Department of the state government. The practice of this statutory public profession, which is comprehensively regulated and governed by the judiciary with the aid of its statutory agency, is not "trade or commerce among the several States, or with foreign nations" within the scope and intendment of the Sherman Antitrust Act, 15 U.S.C. § 1. The issue is not the existence *vel non* of an "exemption" or "immunity" from the statute extended to an elite "learned profession" but of the reach and coverage of the antitrust statute.

In addition to the juristic truth that the pursuit of a public profession by officers of the Judicial Department of government is not "trade or commerce" within the coverage of the antitrust laws, the promulgation of minimum fee schedules by an administrative agency of the Judicial Branch of state government constitutes *state action* beyond the ambit of the antitrust statutes. It is again not an issue of "exemption" or "immunity" but of lack of coverage. If not regarded as "state action" beyond the reach of the Sherman Act, at the very least primary jurisdiction of any attack on the validity of minimum fee schedules would be reposed in the State Supreme Court and its statutory agency who developed and adopted them.

Even if the pursuit of a regulated public profession was "trade or commerce" and its governance and regulation by a statutory agency of the Judicial Department of state government was not state action, the rendition entirely within the state by a local lawyer of purely local legal services for local citizens in matters entirely situated within the state, such as generally covered by minimum fee schedules, does not constitute "trade or commerce *among the several States or with foreign nations*" so as to be within the reach and coverage of the Sherman Antitrust Act. Public profession

and state action considerations aside, Sherman Act application to minimum fee schedules still could not be determined on a blanket basis but would have to be adjudicated on the interstate or intrastate facts of the individual transaction and the particular legal service preformed to which a specific fee in the schedule may have been applied. Home buying is peculiarly local. Most legal services covered by minimum fee schedules constitute local law practice for local people on local matters strictly within the state. Here the antitrust plaintiff's attempted reach must surely exceed his grasp. A blanket federal antitrust condemnation of state bar minimum fee schedules as such would ignore normal commerce considerations in determining federal antitrust application. Assuredly federal antitrust jurisdiction would in no event be so imprecisely adjudicated.

ARGUMENT

I.

THE PRACTICE OF THE LEARNED PROFESSION OF THE LAW TO WHICH MINIMUM FEE SCHEDULES APPLY IS NOT "TRADE OR COMMERCE" COVERED BY THE SHERMAN ANTITRUST ACT.

The practice of the learned, licensed and judicially regulated profession of the law is a public profession by reason of the Virginia statute, which, like the Texas statute and that in thirty other states, establishes a State Bar as an administrative agency of the Judicial Department of the State of which all licensed lawyers of the State are members. Such lawyers are therefore public officers of the Judicial Department of the State. Practice of the law as a member of the Judicial Department of the State is therefore necessarily the pursuit of a learned public profession.

The characteristics of the legal profession are such as to constitute it a public profession, even in the absence of a statute making it such.

Dean Pound stated this truth as a General Juristic Conception at IV *Pound on Jurisprudence* 348 as follows:

> "A profession is a body of men pursuing a common calling as a learned art and as a public service[459] — no less a public service if it is at the same time an individual means of livelihood. It is, therefore, an important social institution. Security of the institution demands that its efficient functioning be maintained. Hence where general rules of law carried out fully would interfere with this the social interest is secured by privilege."

The lucid and lofty juristic conception of the legal profession stated by this timeless sage and scholar of the law should be set out as a backdrop for the determination of the issue of whether the practice of law is to be regarded as "trade or commerce." This is the deathless statement of it at V *Pound on Jurisprudence* 676, *et seq.*:

> "(ii) Nature and definition of a profession. Historically, the practice of law is a profession. It must remain a profession if the purposes of representation in litigation as part of the machinery of justice are to be achieved. A profession is a group of men pursuing a learned art as a common calling in the spirit of public service — no less a public service because incidentally it may be a means of livelihood. The exigencies of the economic order require most persons to gain a livelihood and the gaining of a livelihood is a purpose to which they are constrained to devote their activities. But while in all walks of life man must bear this in

[459] Carr-Saunders and Wilson, The Professions (1933); Carr-Saunders, The Professions, Their Organization and Place in Society (1928); Feuchtwanger, Der Staat und die freien Berufe, Staatsamt oder Sozialamt (1929); Bruno, Die Stellung der freien Berufe im Wirtschaftsleben (1930).

mind, in business and trade it is the primary purpose. In a profession, on the other hand, it is an incidental purpose, pursuit of which is held down by traditions of a chief purpose to which the organized activities of those pursuing the calling are to be directed primarily and by which the individual activities of the practitioner are to be restrained and guided.

* * * *

Next to the idea of public service the important ideas in a profession are organization and pursuit of a learned art. The condition of an unorganized body of lawyers which obtained in the United States in the nineteenth century gave to bar associations in the decadence of professional organization something of the look of trade associations or of dinner clubs. This was the lingering effect of a general movement to deprofessionalize the traditionally professional callings and put all callings in one category of money-making activities which was characteristic of frontier modes of thought in the formative era of our institutions. After formal organization lapsed or all but disappeared the lawyer's tradition of solidarity and traditional incidents of professional organization which survived were of real value for our administration of justice. But the ideal of the profession involves an inclusive and responsible organization toward which we have been moving back steadily since the revival of bar associations in the last third of the nineteenth century and more rapidly since the first quarter of the present century in the development of the integrated bar in more than half of the states.[7]

But in its idea and in its history a profession is a body of learned men pursuing a learned art. Learning is one of the qualities which sets off a profession from a vocation or occupation. Professions are learned from the nature of the art professed. But they have also a cultural ideal side which furthers the exercise of the

[7] See the list in Pound, The Lawyer from Antiquity to Modern Times (1953) 273-275.

> art. Problems of human relations in society, problems of disease, problems of the upright life guided by religion are to be dealt with by the resources of cultivated intelligence by lawyer, physician and clergyman."

Religion, medicine and law are not "trade or commerce" because, under our system of law growing out of Judeo-Christian conceptions, man born in the image of his Creator is not a commodity. Practitioners of medicine and religion who minister to his spirit, mind and body are not thereby engaged in "trade or commerce." The priesthood of the law in protecting man as attorney and advocate in his "life, liberty and pursuit of happiness," and in his Constitutional, statutory and common law rights of person and property, is not just a part of the stream of "trade or commerce."

The Amicus Curiae Brief of the United States Department of Justice by denigrating the lawyer to "a self-employed businessman" or an "independent entrepreneur of legal services" (Brief, pp. 12-13) in its effort to make law practice "trade or commerce" becomes part of what Dean Pound described as "a general movement to deprofessionalize the traditionally professional callings and put all callings in one category of money-making activities which was characteristic of frontier modes of thought in the formative era of our institutions." V *Pound on Jurisprudence* 677.

A. The Issue Is Not Exemption But Coverage.

The Petitioner, the Amicus Curiae Brief of the Department of Justice, and the District Court in *United States* v. *Oregon State Bar*, Civil No. 74-362 (D. Ore.) (Petitioners' Brief, Addendum B, B-19), commit the common error of declaring the minimum fee schedule to violate the Sherman Antitrust Act because the Court cannot "create" or "forge"

a "new exemption" to the statute. Their mutual mistake is that the *issue of exemption* is not reached until *coverage* has first been found. No question of *"exemption" arises until the subject matter of law practice is first held to be "trade or commerce"* because that is all to which § 1 of the Sherman Act applies. The error is compounded by looking to the derided "commercial nature" of the *fee* as determinative of coverage rather than to the *legal service* which the fee compensates. A clergy agreement upon minimum *honoraria* for conducting baptismal, marital and funeral services would not fall beyond the antitrust ambit because there is an implied exemption of the prices for such professional services, but because the performance of these holy rites by a man of the cloth is not "trade or commerce." The nature of the service performed and not the nature of the compensation for it is determinative of coverage. It requires this double error of transposing *exemption* and *coverage* and of testing by *price charged* instead of by *service rendered* to reach the conclusion that minimum fees on legal services contravene the Sherman Act proscriptions against restraint of "trade or commerce."

B. Predominant Judicial Expressions and Basic Juristic Conceptions Support the Absence of Coverage.

The District Court in *United States* v. *National Society of Professional Engineers*, Civ. No. 2412-72 (D.D.C.) (Appendix, Department of Justice Amicus Curiae Brief) not only erroneously fears "a dangerous form of elitism • • • to dole out exemptions to our antitrust laws merely on the basis of educational level • • • or the impact which the profession has upon society's health and welfare," but also entirely misses the sharp line of delineation between highly educated call-

ings and learned professions drawn at V *Pound on Jurisprudence* 677 as follows:

> "A profession, such as the ministry, medicine, law, teaching, is much more than a calling which has a certain traditonal dignity. Certain other callings in recent times have achieved or claim a like dignity, but lack the essential primary purpose. For example, if an engineer discovers a new process or invents a new mechanical device he may obtain a patent and retain for himself a profitable monopoly. If, on the other hand, a physician discovers a new specific for a disease or a surgeon invents a new surgical procedure they each publish their discovery or invention to the profession and so to the world. If a lawyer has learned through research or experience something useful to the profession and so to the administration of justice he publishes it in a legal periodical or expounds it before a bar association or in a lecture to law students. It is not his property. He may publish it in a copyrighted book and so have rights to the literary form in which he put it. But the process or method or developed principle he has worked out belongs to the world."

The Justice Department Brief (p. 30) argues that some legal services are "available from other sources, such as real estate brokers and title companies," and that because these non-lawyer competitors are subject to the Sherman Act under *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, lawyers must be as well. Such is not the case unless the real estate broker or the title company is unlawfully engaged in the unauthorized practice of law. The contention is further exploded by the *Real Estate Boards* decision which delineates between a trade and a profession by quoting with approval from Justice Story in *The Nymph*, 18 Fed. Cas. 506, this decisive principle:

> "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or in the learned professions*, it is constantly called a trade." (Emphasis supplied). 339 U.S. 490.

The opinion, at p. 492, pinpoints the basis of Sherman Act coverage for real estate brokers:

> "Their activity is commercial and carried on for profit."

The Court had earlier followed the principle asserted by Justice Story and quoted the same language from *The Nymph* as decisive, including the sentence:

> "In the first place, the word 'trade' is often and, indeed, generally used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile."

There is an express exclusion from the coverage of this definition of those engaged "in the liberal arts or in the learned professions." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 436. It is made clear that the definition of "trade" is not to be extended by the declaration at p. 437 that Justice Story had defined the word "in the general sense" and by "broad" definition.

Indeed the distinction is perceived by the D.C. District Court in *United States of America* v. *National Society of Professional Engineers, supra*, which states:

> "Unlike the lawyer's brief or the scholar's text which convey thought, an engineer's blueprints constitute a necessary physical tool which combined with standardized techniques of manufacturing and construction, yield a final, functional reduction to practice. In this regard, professional engineering enjoys a maximum interface within the products of construction and manufacture. * * * This is not a case of indirect and insubstantial impact by a so-called learned profession upon interstate commerce." (Department of Justice Brief, Appendix 9a-10a).

The Department of Justice desires to subject law practice to the Sherman Act for "the ultimate purpose" of "preservation of competition" (Department of Justice Amicus Curiae Brief, p. 25). The precise and powerful answer to the Antitrust Division bid for lawyer price competition is phrased at V *Pound on Jurisprudence* 677 as follows:

> "There is no such thing as competition for clientage in a profession. Every lawyer should exert himself fully to do his tasks of advice, representation, and advocacy to the best of his ability. But competition with fellow members of the profession in any other way is forbidden. Competition belongs to activities which are primarily acquisitive. It is not allowable in those primarily for public service."

C. American Medical Association v. United States Relates to Prepaid Group Health Plans Rather Than Practice of Medicine And Is Not Controlling.

Petitioners argue that *American Medical Association* v. *United States*, 317 U.S. 519, is controlling on the question of law practice constituting "trade or commerce" despite the clear declaration of the Court on antitrust coverage of the learned professions at page 528 that "we need not consider or decide this question." The Court held that a conspiracy between a medical association and certain physicians to restrain, binder and obstruct the business of Group Health Association, Inc., an incorporated cooperative whose members made prepayments to a plan under which they jointly procured health and hospital services, constituted "a single conspiracy to obstruct and restrain the business of Group Health" and that "the calling or occupation of the individ-

ual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health." The charged conspiracy aimed restraints at a business outside of the profession. A comparable case would be a conspiracy of a bar association and its lawyer members to restrain, hinder or destroy the *outside* lawful business of a title company or a group legal services plan. The decision expressly does not govern the adoption of a minimum fee schedule *within* the legal profession.

The distinction is implicit in the Court's approving quotation of the trial court jury charge as follows:

> "If it be true ... that the District Society, acting only to protect its organization, regulated fair dealing among its members, and to maintain and advance the standards of medical practice, adopted reasonable rules and measures to those ends, not calculated to restrain Group Health, there would be no guilt, though the indirect effect may have been to cause some restraint against Group Health." (317 U.S. 533).

D. Present and Future Policy Considerations Both Support Judicial Control Rather Than Antitrust Regulation of the Legal Profession.

Repeated Congressional recognition of the policy need for separate treatment of the professions in federal regulatory statutes has been of such long standing as to be regarded as historic. Professional employees are exempt from the Fair Labor Standards Act because their compensation is unrelated to hours of work. 29 U.S.C. 201, et seq. They are segregated in separate units under the National Labor Relations Act. 29 U.S.C. 141. Professional services have been uniformly excluded from both state and federal competitive bidding statutes. In England minimum fees for solicitors

are regulated by orders issued under the Solicitors' Act of 1957, as amended, 5 & 6, Eliz. 2 Sec. 56.

In truth there are deep and broad concepts of public policy which point to the removal of all labor of the hand or of the head from the strictures of the antitrust laws. Collective action on wages and salaries is relieved from antitrust prohibitions as a matter of policy by 15 U.S.C. § 17 because "The labor of a human being is not a commodity or article of commerce." See *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U.S. 676. In discussing antitrust immunity of combinations to fix rates of pay, Mr. Justice Jackson, dissenting in *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, *supra*, at 496, said:

> "I suppose this immunity is not confined to those whose labor is manual, and is not lost because the labor performed is professional."

At this advanced stage of proven development the statutory state bar, unified as an integrated part of the Judicial Department of the State, surely must be established as sound public policy. A concomitant part of that policy is the government and regulation exclusively by the Judiciary through its statutory agency of the practice of law as a public profession, including admissions, discipline, ethics, codes and standards of professional conduct, and all like important areas including attorneys' fees. Out of this policy has developed far reaching programs of supplying legal services to the indigent, of developing more readily available and more economical legal services for middle income groups through group legal service plans, the advancement of paralegal assistants and the development of specialization as aids to more competent, efficient and economical legal services, the extensive development of lawyer referral services to make legal services more accessible to the pub-

lic, and growing impetus for many other professional developments for the better service of the public.*

Along with this vital policy development of a public profession governed by the Judiciary through a statutory state bar as its agency, there has developed a countermovement for the deprofessionalization and the federalization of the legal profession. Its present major thrust, among various others that await in the wings, is the federal antitrust attack on minimum fee schedules. It is respectfully submitted that displacing state judicial control of this area of law practice by the imposition of antitrust proscriptions applicable to "trade or commerce" would be deeply disruptive to this advanced public policy and a tremendous step backwards to what Dean Pound more than twenty years ago termed "a general movement to deprofessionalize the traditionally professional callings and put all callings in one category of money-making activities which was characteristic of frontier modes of thought in the formative era of our institutions." He followed with the prophetic warning in V *Pound on Jurisprudence* 680:

> "Today the idea of a profession is again seriously threatened. * * * Moreover, the endeavor of many callings today to be classed as professions, although primarily money-making in purpose and spirit, must be taken into account. The movement to elevate the standards of business and of all callings is a worthy one. But in elevating these, vigilance is needed that the purpose is not achieved by pulling down the standards of the old recognized professions to a common level with the newer ones."

A judgment for the Petitioners in this case would go far toward such a "pulling down."

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* 40 *California State Bar Journal* 720; 61 *Illinois Bar Journal* 536; 10 *Hawaii Bar Journal* 30; Vol. II Sept. 1973 *Pro Bono Report;* 58 ABA Jn. 31 (on the merits of minimum fee schedules); 56 *ABA* Jn. 1164; 52 *ABA* Jn. 1043; 38 *Kentucky Bar Journal* 35.

II.

MINIMUM FEE SCHEDULES PRINCIPALLY RELATE TO LOCAL LEGAL SERVICES IN PURELY INTRASTATE TRANSACTIONS BEYOND THE COVERAGE OF THE SHERMAN ANTITRUST ACT.

Even if the practice of law be cynically regarded as mere "trade or commerce," the legal services to which minimum fee schedules generally apply still do not relate to transactions substantially affecting "trade or commerce among the several States or with foreign nations" within the reach and application of § 1 of the Sherman Act. Generally there will in no event be Sherman Act coverage because both the legal service and the transaction to which it relates will be strictly intrastate with no substantial effect on interstate or foreign commerce. Minimum fee schedules viewed in their entirety predominantly relate to matters in strictly intrastate commerce and beyond even "the farthest reaches of the commerce power."

A. The Legal Services To Which Minimum Fee Schedules Apply Are Generally Strictly Intrastate And Without Substantial Effect on Interstate Commerce.

Speaking in a different context, the Department of Justice Amicus Curiae Brief effectively admits the essentially local and intrastate character of minimum fee schedules in their application by such pronouncements as these:

> "Not surprisingly, fee schedules appear to be used most heavily by low-income lawyers."*

> "The primary impact of minimum fee schedules is upon small businesses and middle income individuals,

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* *Time,* Sept. 16, 1974, states in "The Law" that "about three-quarters of the private attorneys in the U.S. work in offices that have three lawyers or fewer." Smith and Clifton, 52 ABA Jn. 1043 (1966), put it at 83%. A 1970 ABA survey put lawyer median annual income at $21,260, 56 ABA Jn. 1164.

who only occasionally use legal services. Proponents of such fee schedules assert that they are most useful 'in routine affairs that affect the individual: divorce, adoption, sale of a home, probating a smaller estate or routine appearance in court.' Miller & Weil, Let's Improve, Not Kill, Fee Schedules, 58 A.B.A. 31, 32 (1972). Such schedules also typically cover transactions likely to be encountered by small businesses, such as creation and dissolution of partnerships and corporations, bill collection, minor litigation, foreclosure and bankruptcy. See Arnould & Corley, *supra*, 57 A.B.A.J. at 657.

"By contrast, legal services for large enterprises and persons of wealth tend to be unaffected by minimum fees • • •."

Strong authority that the essentially personal and local legal services covered by minimum fee schedules do not substantially affect interstate commerce so as to fall within the coverage of § 1 of the Sherman Act is *United States* v. *Oregon Medical Society*, 343 U.S. 326, in which the Department of Justice claimed § 1 and § 2 Sherman Act violations through monopoly of group prepaid medical care plans and restriction of competition in group prepaid medical care plans by the defendant state medical society and defendant county medical societies sponsoring such plans. In sustaining a finding that such plans did not substantially affect interstate commerce under the Sherman Act, the opinion by Mr. Justice Jackson states at 343 U.S. 338:

"Almost everything pointed to in the record by the Government as evidence that interstate commerce is involved in this case relates to across-state-line activities of the private associations. It is not proven, however, to be adversely affected by any allocation of territories by doctor-sponsored plans. So far as any evidence brought to our attention discloses, the activities of the latter are wholly intrastate. The Government

did show that Oregon Physicians Service made a number of payments to out-of-state-doctors and hospitals, presumably for treatment of policy holders who happened to remove or temporarily be away from Oregon when need for services arose. These were, however, few, sporadic and incidental."

The principle that the peripheral interstate facets of a local title examination by a local lawyer on the local purchase of a local home do not convert the transaction into one substantially affecting interstate commerce within the coverage of the Sherman Act seems to be recognized in the declaration in *Federal Baseball Club of Baltimore, Inc.* v. *National League*, 259 U.S. 200, 209, that: "A firm of lawyers sending out a member to argue a case • • • does not engage in commerce because the lawyer goes to another state."

B. Antitrust Law Coverage Must in Any Event Be Determined on Commerce Facts of Individual Transactions and Not on a Blanket Basis.

Despite the fact that only the particular individual facts of the Goldfarb home purchase are in evidence or in issue, both the Petitioners by an attempted class action device and the Justice Department in its amicus curiae brief appear to seek a blanket antitrust condemnation of minimum fee schedules *per se* without any reference to the particular commerce facts of individual transactions to which items in the minimum fee schedule may be applied. It is basic to the Sherman Act that coverage is tested on the commerce facts of particular transactions and not on a blanket basis by the general nature of a business, industry or profession.

Since the briefs in favor of the Petitioner here concede that the transactions in issue are not in the "stream of

commerce", the determination of coverage in any event has to be made "under the 'affecting commerce' or quantitative test, where the issue is whether the effect on commerce is significant." The quantitative test can only be applied on the basis of the particular commerce facts of an individual transaction to which a particular minimum fee provision is applied. ABA *Antitrust Developments* 39.

Is antitrust coverage *even arguable* where one local resident conveys a home to another local resident and title examination and conveyancing is done by a local lawyer in an all cash transaction or by the seller individually carrying the mortgage loan or where the mortgage involves no out-of-state lender or guarantor? What have the peripheral and remote interstate facets of the Goldfarb home purchase to do with the defense of a state criminal case or municipal traffic ticket, the drafting and probating of the will of a local citizen involving no out-of-state property, a divorce between two local residents with no out-of-state property involved, or a myriad of other purely local transactions having no interstate aspects whatever to which minimum fee schedules are applied?

The judicial process is not well served by seeking a broad brush antitrust obliteration of minimum fee schedules in their entirety in total disregard of the fact that their particular provisions are generally applied to transactions having no interstate aspects whatever. Seemingly such gross imprecision in adjudication should not be countenanced.

Petitioners concede the rubric that "determinations of commerce questions under the Sherman Act must be resolved on a case-by-case basis" (Petitioners' Brief p. 48). Yet Petitioners move from that to seeking blanket treatment of all of the cases of all of the home buyers in the

"bedroom communities" for northern Virginia. Both Petitioners and the Department of Justice then seem to vault from that bootlift level to a third plateau with a plea for a sweeping, all-inclusive antitrust adjudication condemning all minimum fee schedule provisions in all individual cases now or hereafter, though the facts of such individual cases involve neither home purchases nor northern Virginia and are neither in evidence nor in issue. This surely must be wholly impermissible.

III.

VIRGINIA MINIMUM FEE SCHEDULES ARE THE PRODUCT OF STATE ACTION BY THE VIRGINIA STATE BAR AS A STATUTORY AGENCY OF THE SUPREME COURT OF VIRGINIA AND ARE NOT WITHIN THE APPLICATION OF THE SHERMAN ANTITRUST ACT.

Not only is the Virginia State Bar, like the State Bar of Texas, a statutory agency of the Supreme Court of the State and a part of its Judicial Department, but the adoption of minimum fee schedules by official action of the agency and promulgation by the Supreme Court constitutes State action to which the Sherman Antitrust Act simply does not apply.

In addition to its statutory status as an agency of the Supreme Court of the State and its official role in enforcement of Disciplinary Rules having the force of law, the State action role of the Virginia State Bar, like that of the State Bar of Texas,* has been made clearer still by the official adoption by the State Bar and the official promulgation by the Supreme Court of a comprehensive Code of Professional Responsibility having the force of law. The basic commitment of the State Bar to the ready availability

* Title 14, App. Art. 12, S. 8, *Vernon's Annotated Texas Statutes.*

of competent legal services to all its citizens is embodied in the very first statement in Canon 1 of the Code of Professional Responsibility:

> "A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence."

This legal declaration of professional duty to the public is expanded upon in Canon 2 as follows:

> "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available. The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available."

The professional duty as a matter of law of the legal profession to carry on public information and education programs for the benefit of the citizens is clearly and firmly asserted in Canon 2-2 as follows:

> "The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities include preparation of institutional advertisements and professional articles

> for lay publications and participation in seminars, lectures, and civic programs."

The Code deals comprehensively with the ethical standards to be employed in determining reasonable attorneys' fees and is unequivocal in its mandate for the provision of competent and adequate legal services in those circumstances where the client is not able to pay such a reasonable fee. Canon 2-24 recognizes that:

> "Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors."

Under these circumstances, it is declared in Canon 2-16:

> "Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain legal services, and lawyers should support and participate in ethical activities designed to achieve that objective."

The lawyer's obligation to see that legal services are not denied to any citizen because of inability to pay a reasonable fee is stated in Canon 2-25 as follows:

> "Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional work load, should find the time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need.

> Thus, it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, Lawyer Referral offices, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services."

Commentators have agreed than Canon 2 as quoted above "is a near-radical departure from familiar ethical principles; its axiomatic statement that the legal profession has an affirmative 'duty to make legal counsel available' to the general public, with its corollary that a lawyer has a duty to assist the profession in fulfilling its duty, is new to the legal profession." 61 *Ill. Bar Jn.* 134; 48 *Tex. L. Rev.* 285.

The Code also provides the governing principles in the determination of reasonable attorneys' fees for those able to pay in Canon 2-17 and 2-18 as follows:

"EC 2-17. The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC-18. The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. * * * *"

No amount of attenuated reasoning can escape the fact that the adoption by a statutory agency and the promulgation by the Supreme Court of such fee schedules to "provide some guidance on the subject of reasonable fees" constitutes state action.* The Code of Professional Responsibility states a body of law governing the legal profession and of the lawyer in the discharge of the duty of this public profession to provide through its public officer members legal services to the members of the public and the duties of those officers of the court in determining the reasonable fees to be charged to those able to pay. It is in this context of a code of law governing the profession and its members that fee schedules are promulgated in the light of the declared duties of the profession and its members. Undergirding this structure are Disciplinary Rules having the force of law and a statutory agency with the lawful duty and the lawful power to enforce them.

A. Parker v. Brown is Controlling.

Such state action is not within the application of Section 1 of the Sherman Act under *Parker* v. *Brown,* 317 U.S. 341, and the array of cases folowing and reenforcing its rule that state action through a statutory agency, even though it be in the nature of self-regulation, is beyond the federal

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* Article 2226, *Vernon's Texas Civil Statutes* expressly adopts State Bar Minimum Fee Schedules as follows: "The amount prescribed in the current State Bar Minimum Fee Schedule shall be prima facie evidence of reasonable attorney's fees. The court, in non-jury cases, may take judicial knowledge of such schedule and of the contents of the case file in determining the amount of attorney's fees without the necessity of hearing further evidence."

antitrust ambit. In *Parker* v. *Brown* raisin producers proposed production and sales quotas and adopted them by referendum but they were approved by the statutory Commission, just as minimum fee schedules are adopted pursuant to referendum by the statutory agency and in addition promulgated by the Supreme Court. It is state action to which federal antitrust laws do not apply because:

> "It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy....
>
> The state in adopting and enforcing the prorate program made no contract or agreement and it entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."

On the authority of *Parker* v. *Brown*, insurance rates proposed by a rating bureau composed of insurance companies subject to approval by the State Commissioner of Insurance did not violate the Sherman Act. *Allstate Insurance Co.* v. *Lanier*, 361 F. (2d) 870 (4th Cir. 1966). Reduced rates for all-electric homes to exclude the competition of gas proposed by the electric company and approved by the State Corporation Commission did not violate the Sherman Act because it was state action. *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F. (2d) 248 (4th Cir. 1971); *Gas Light Co. of Columbus* v. *Georgia Power Co.*, 440 F. (2d) 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972). *See* Handler, 72 Col. L. Rev. 1, 13 (1972).

B. The Issue Is Not Exemption or Immunity But Absence of Coverage.

Briefs by Petitioners and the Department of Justice again both miss the mark in arguing against implied exemptions or immunities. No issue of exemption or immunity is even involved. Where a state action is present, federal antitrust coverage is simply absent. Professor Handler puts it that "the exception from antitrust coverage applies whenever the pertinent state statute provides for ultimate governmental control, regardless of the manner in which the regulatory agency has carried out its duties." *Id.* 13.

C. Primary Jurisdiction of the State Supreme Court and Its Statutory Agency Should in Any Event Apply.

Even if this were not such a clear case of state action beyond the scope of the Sherman Act, it would appear that primary jurisdiction should be accorded to the State Supreme Court which promulgated the minimum fee schedules adopted by its statutory agency which governs and regulates the legal profession. Any attack on the minimum fee schedules as invalid, unlawful, anticompetitive or unreasonable should first be made there rather than in the antitrust forum of the federal court.

Far Eastern Conference v. *United States*, 342 U.S. 570 (1952); *United States* v. *Western Pacific RR. Co.*, 352 U.S. 59 (1956); *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959); *Carter* v. *American Telephone & Telegraph Company*, 365 F. (2d) 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967); *Crain* v. *Blue Grass Stockyards Co.*, 399 F. (2d) 868 (6th Cir. 1968), and *Locust Cartage Co.* v. *Trans American Freight Lines, Inc.*, 430 F. (2d) 334 (1st Cir. 1970), constitute part of a long-established line of cases currently culminating in the late

decisions of this Court in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), and *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973), all invoking and applying primary jurisdiction of the federal or state regulatory agency so as to stay what has been termed "piece-meal, sporadic decisions by courts" which it is declared "should not interfere with or bypass the statutory schemes." *Watts* v. *MKT RR. Co.*, 383 F. (2d) 571, 583 (5th Cir. 1967).

In the *Ricci* case, the Court describes the primary jurisdiction process as being "where the regulatory regime is administered by an agency, the Antitrust Court will stay its hand to permit institution of administrative proceedings if they are 'likely to make meaningful contribution to the resolution of this lawsuit.'" 409 U.S. 396. It would seem to be implicit in the primary jurisdiction philosophy that at the very least the antitrust court should stay its action and defer primary consideration of any attack on the minimum fee schedules as being anticompetitive, unreasonable or unlawful to the State Supreme Court whose statutory agency developed them after which "the Antitrust Court will be in a position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the [statutory agency] permits." *Id.* 409 U.S. 307-308.

D. Judicial Rather Than Antitrust Regulation of the Legal Profession Should be Preferred.

The salutary, progressive and wholesome process of regulation by the courts of their own officers and government of the legal profession by the judiciary, which is a rapidly developing rather than a merely emerging reform, should not be impeded or disrupted by the intervention of federal antitrust regulation by lawsuit.

CONCLUSION

The minimum fee schedules in issue are a part of the state judicial regulatory scheme implementing the Disciplinary Rules and the Code of Professional Responsibility, including Canon 2-16:

> "The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them."

The laborer in the law "is worthy of his hire." The involvement of lawyer livelihood does not warrant abandoning the grandeur of the Pound conception of the profession for the culturally arid and drouth bitten concept of law practice as shabby and greedy fee grubbing.

The law practice which the minimum fee schedules cover is not "trade or commerce." If it were so regarded, the legal services to which the minimum fee schedules most generally apply would not substantially affect interstate commerce so as to permit federal antitrust coverage. This in any event would have to be determined on a case-by-case basis from the individual commerce facts of particular transactions to which a particular provision of the minimum fee schedules might be applied. Such minimum fee schedules are the product of state action and hence beyond the antitrust ambit. The Court of Appeals correctly left the government and regulation of the legal profession, including minimum fee schedules, with the State Supreme Court and its

statutory agency where they have been reposed by state law and properly belong. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

.....

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January, 1975

PROOF OF SERVICE

I, John Leroy Jeffers, attorney for the State Bar of Texas, Amicus Curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of January, 1975, I served three copies each of the foregoing Amicus Curiae Brief of the State Bar of Texas on the several parties to this action, as follows:

On Lewis H. Goldfarb and Ruth S. Goldfarb, Petitioners, Virginia State Bar, Respondent, and Fairfax County Bar Association, Respondent, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to their respective attorneys of record, at their addresses of record, as follows:

(1) To Alan B. Morrison, Esquire, attorney for Petitioners, 2000 P Street N.W., Suite 700, Washington, D.C., 20036;

(2) To Stuart H. Dunn, Esquire, Assistant Attorney General, Commonwealth of Virginia, attorney for Respondent Virginia State Bar, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia, 23219; and

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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LEWIS H. GOLDFARB and RUTH S. GOLDFARB,
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Virginia Homeowners,
Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE*

INTEREST OF AMICUS CURIAE

The American Bar Association is a wholly voluntary bar association whose membership is open to the members of the bar of the states, territories and possessions of the United States. It is the largest organization of the legal profession in the United States, having more than 185,000 members. The purposes of the Association include the

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* This brief is filed with the consent of all parties pursuant to Rule 42 of the Court.

promotion of the administration of justice, the maintenance of representative government, the application of the knowledge and experience of the profession to the promotion of the public good, upholding the honor of the profession of law, and the promotion of various activities of state and local bar associations throughout the nation in the interests of the public and of the profession. There is no more important activity of the Association in furtherance of these purposes than the development and promulgation of professional standards. *Amicus* is deeply committed to the proposition that such standards are essential to the preservation of the quality and integrity of the legal profession.

The significance of this case is far greater than the specific issues presented. The Court's interpretation of the relationship between the antitrust laws and traditional restrictions on professional conduct will of necessity affect the ability of bar associations to regulate the conduct of attorneys. Both as an entity devoted to the development of ethical standards and as a representative of its members, *amicus* has a substantial interest in preserving the important social objectives served by professional regulation.

QUESTIONS PRESENTED

In granting a writ of certiorari in the case, the Court certified three questions for plenary review: whether minimum fee schedules promulgated by bar associations are exempt from the antitrust laws by reason of a "learned profession" exemption; whether such schedules dealing with legal services performed in connection with residential real estate transactions affect interstate commerce; and whether under the facts of this case the actions of the Virginia State Bar are within the "state action" exemption of *Parker* v. *Brown,* 317 U.S. 341 (1943). This brief is concerned with only the first of these questions and does not address the "interstate commerce" or "state action" issues also certified for review.

ARGUMENT

I. ANY APPLICATION OF THE ANTITRUST LAWS TO PROFESSIONAL CONDUCT MUST REFLECT THE DIFFERENCES BETWEEN THE PROFESSIONS AND ORDINARY TRADE OR COMMERCE.

A. Courts Have Consistently Recognized That The Application Of The Antitrust Laws To The Professions Involves Unique Questions And Considerations.

The antitrust laws were enacted to prevent restraints on free competition in the business world. *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 141 (1961); *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 492-93 (1940). While there are similarities between the professions and commercial business, there are also significant differences, the most notable of which is the existence of ethical standards and obligations governing professional conduct. The Court has recognized that traditional modes of business competition may be destructive of the ethical standards of a profession, *United States* v. *Oregon State Medical Society,* 343 U.S. 326 (1952); *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935); and all antitrust decisions in any way concerned with the professions have carefully considered the particular characteristics of the profession involved. *See, e.g., American Medical Ass'n* v. *United States,* 317 U.S. 519 (1943); *Northern California Pharmaceutical Ass'n* v. *United States,* 306 F.2d 379 (9th Cir.), *cert. denied,* 371 U.S. 862 (1962); *United States* v. *Utah Pharmaceutical Ass'n,* 201 F. Supp. 29 (D. Utah), *appeal dismissed,* 306 F.2d 493 (10th Cir.), *dismissal of appeal aff'd.,* 371 U.S. 24 (1962).

One such special characteristic is the existence of extensive self regulation which has long been regarded by the courts and society at large as essential to the quality and integrity of the legal profession. An important aspect of such regulation traditionally has been codes of ethics governing professional activities. By their very nature, these ethical codes restrict or restrain professional conduct in ways which would appear to conflict with antitrust precepts developed by the courts in the context of ordinary trade or commerce. Nevertheless, it has always been recognized that such restrictions serve important social values. Whether it be viewed as an exclusion from, or a different application of, the antitrust laws, the position of the professions under those laws must reflect these countervailing values.

Although this is a case of first impression in that the Court has never definitively ruled whether the antitrust laws apply to the legal profession, there are statements in the opinions of this and other courts that the provision of professional services is not "trade or commerce," a view which would place those services entirely outside the ambit of the antitrust laws. *See, e.g., Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U.S. 427, 435-36 (1932); *Fed. Trade Comm.* v. *Raladam Co.,* 283 U.S. 643, 653 (1931); *Federal Baseball Club* v. *National League of Prof. Baseball Clubs,* 259 U.S. 200, 209 (1922); *The* [*Schooner*] *Nymph,* 18 F. Cas. 506, 507 (C.C.D. Me. 1834). In two other cases, the Court found it unnecessary to decide this question. *United States* v. *National Ass'n of Real Estate Bds.,* 339 U.S. 485, 490-91 (1950); *American Medical Ass'n* v. *United States,* 317 U.S. 519, 528 (1943).[1] Whatever may be the preceden-

[1] Petitioners incorrectly assert that this case is "squarely within the ruling" of *American Medical Ass'n* v. *United States,* 317 U.S. 519 (1943). In *AMA,* two medical associations were charged with conspiracy to hinder and obstruct the operation of a group health corporation. The court determined that the corporation was "engaged in business or trade" and held that if ". . . the indictment charges a single conspiracy to restrain or obstruct *this business* it charges a conspiracy in restraint of trade or commerce . . ." 317 U.S. at 528 (emphasis supplied). The Court expressly declined to consider or decide "the question whether a physician's practice of his profession constitutes trade" under the Sherman Act. 317 U.S. at 528. The present case involves no conspiracy, the purpose of which is to restrain a commercial entity. Rather, the restraint is allegedly imposed directly on the relationship between attorneys and their clients. Plainly the question presented by this case is the question expressly reserved in the *AMA* decision.

tial value of these cases, they reflect long standing recognition of the unique considerations and questions involved in any application of the antitrust laws to the professions. As Judge Kaufman recently stated in *Emle Industries, Inc.* v. *Patentex, Inc.,* 478 F.2d 562, 575 (2d Cir. 1973):

> "It is hardly appropriate to cast aside ethical responsibilities out of an excess of antimonopolistic fervor."

The unique characteristics of the professions were so widely and firmly accepted that antitrust challenges to self regulation of the legal profession have occurred but recently. Only within the last two years have courts considered such challenges, and the general conclusion has been that the legal profession is at least partially excluded from the operation of the antitrust laws. In *Stafford* v. *Brennan,* 498 S.W. 2d 703, 707-08 (Tex. Civ. App. 1973), the court relied upon such an exclusion in holding that the use of a minimum fee schedule was consistent with the Sherman Act. Similarly, the New York Court of Appeals recently upheld a minimum fee schedule under a state antitrust law similar to the Sherman Act on the ground that some partial exclusion is implicit in the law. *Lincoln Rochester Trust Co.* v. *Freeman,* 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 (1974). A limited professional exclusion was also invoked by the Fourth Circuit in this case:

> "Throughout the development of federal antitrust law there has been judicial recognition of a limited

exclusion of 'learned professions' from the scope of the antitrust laws. This exclusion is not a favor bestowed upon professionals by the courts as a 'professional courtesy'; the exclusion arises from the language of the statutes and the peculiar nature of the services rendered." 497 F.2d at 13.

In the recent decision in *United States* v. *Oregon State Bar,* (D. Ore., No. 74-362, November 22, 1974), the court held that the "fee schedule activities" in question were "not immune to Sherman Act attack. . . by the 'learned profession' exemption." (Decision and Order, p. 19) This decision, however, did not indicate that the antitrust laws should be applied to the professions in the same manner they are applied to the business world. Indeed, the decision acknowledged that the antitrust laws may have to be applied to the legal profession in only a limited fashion; and accepted both this Court's recognition of the differences between the professions and the business world and the need carefully to consider those differences in determining the application of the antitrust laws to the profession in question. (*Id.,* pp. 14-18) Although that court, in weighing those considerations, found the antitrust laws applicable to the facts involved in that case, the decision does stand for the more general proposition espoused by *amicus* that any application of the antitrust laws must reflect the unique characteristics of the legal profession.

These cases are consistent with a variety of other contexts in which the courts have found the antitrust laws inapplicable to challenged restraints arising in connection with special professional services. *See, e.g., Marjorie Webster Jr. Col.* v. *Middle States Association of C. & S.S.,* 432 F.2d 650 (D.C. Cir.), *cert. denied,* 400 U.S. 965 (1970); *Riggall* v. *Washington County Medical Society,* 249 F.2d 266 (8th Cir. 1957), *cert. denied,* 355 U.S. 954 (1958); *Nankin Hospital* v. *Michigan Hospital Service,* 361 F. Supp. 1199

(E.D. Mich. 1973); *Meyer* v. *Massachusetts Eye and Ear Infirmary,* 330 F. Supp. 1328 (D. Mass. 1971). In such situations, the courts have not sought totally to immunize professional conduct from scrutiny under the antitrust laws. On the contrary, they have recognized that restrictions arising in connection with professional services which are inconsistent with the objectives of an exclusion and which have the purpose or effect of restraining commerce are subject to those laws. *See, e.g., American Medical Ass'n* v. *United States,* 317 U.S. 519 (1943); *Levin* v. *Doctors Hospital, Inc.,* 354 F.2d 515 (D.C. Cir. 1965). These cases do, however, contain ample support for the proposition that an exclusion, or some other mechanism, must exist to harmonize necessary professional regulation with antitrust principles developed in the context of ordinary trade or commerce.

B. Failure To Differentiate Between The Professions And Ordinary Trade Or Commerce Could Transform Numerous Professional Practices Of Unquestionable Social Worth And Legality Into Federal Antitrust Violations.

An interpretation of the antitrust laws which fails to reflect the unique characteristics of the professions could render illegal fundamental limitations on professional conduct which our society has always regarded as highly desirable. There is perhaps no better illustration of the need to exclude certain professional conduct from a mechanical application of the antitrust laws than to enumerate some of the principles of professional ethics that such an application could cause to be unlawful.

An agreement among competitors to restrict advertising of prices is a form of "price-fixing" and is a per se violation of the Sherman Act. *United States* v. *Gasoline Retailers Association, Inc.,* 285 F.2d 688 (7th Cir. 1961). Yet, strong

and well-established policy considerations support such restrictions on professional advertising. *See, e.g., Jacksonville Bar Association* v. *Wilson,* 102 So. 2d 292 (Fla. 1953); Cheatham, *Cases and Materials on the Legal Profession* at 525 (2d Ed. 1955). Similarly, an agreement among competitors to refrain from soliciting each other's customers is unlawful per se. *United States* v. *Topco Associates, Inc.,* 405 U.S. 596 (1972). But hostility to the practices of barratry, maintenance, and champerty has traditionally justified strict limitations upon solicitation by attorneys. The Court has itself recognized that advertising and solicitation may be incompatible with an attorney's professional responsibilities. *Cohen* v. *Hurley,* 366 U.S. 117, 124 (1961).

Competitors who agree to limit maximum prices also commit a per se offense. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951). But the activities of the legal profession to insure that practitioners refrain from overcharging, including the use of limitations on maximum fees, have always been considered proper and, indeed, essential. *See State ex rel. Nebraska State Bar Ass'n* v. *Richards,* 165 Neb. 80, 84 N.W.2d 136 (1957); *State ex rel. Lee* v. *Buchanan,* 191 So. 2d 33 (Fla. 1966). Moreover, an agreement among competitors not to price on a contingent basis would certainly run afoul of the prohibition against any concerted action which limits pricing alternatives, *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); but society has always considered it highly undesirable for attorneys to accept criminal cases on a contingent fee basis. *See Peyton* v. *Margiotti,* 398 Pa. 86, 156 A.2d 865, 867-69 (1959). Under *Socony-Vacuum* even prohibitions against fee splitting would appear to be illegal.

Many of the same ethical principles govern the medical profession. In addition, doctors must frequently decide whether to purchase or utilize vital goods and services. A

concerted refusal to deal is a per se violation of the Sherman Act, *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959)[2]; but, as one Federal Trade Commissioner has observed, few would automatically apply such a rule to physicians in a medical society refusing to prescribe untested drugs, to use inferior surgical instruments, or to send patients to a substandard private hospital. *Community Blood Bank of the Kansas City Area, Inc.,* 70 F.T.C. 728, 948-58 (1966) (dissenting opinion of Commissioner Elman), *reversed sub nom., Community Blood Bank of Kansas City Area, Inc.* v. *F.T.C.,* 405 F.2d 1011 (8th Cir. 1969). Moreover, the highly specialized and technical nature of the medical profession often requires peer review of the adequacy of an individual practitioner's performance. Such review of a doctor's performance by his fellow practitioners is designed to restrict, indeed eliminate, the delivery of inferior medical services, but certainly no one would prefer that the review be conducted solely by less qualified parties.

It is clear from these examples that a mechanical application of the antitrust laws to the professions would be completely inconsistent with objectives which society has long felt desirable. There is no support in the case law, in legislative history or in sound public policy for the Court to approve such a radical departure from established principles.

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[2] Although concerted refusals to deal are denominated per se violations, there are of course certain narrow defenses and exceptions to this per se rule. *See, e.g., Swift & Co.,* v. *United States,* 393 F.2d 247 (7th Cir. 1968); *United States* v. *Sugar Institutes,* 15 F. Supp. 817 (S.D.N.Y. 1934), *modified on other grounds,* 297 U.S. 553 (1936). However, it is highly questionable whether the very narrow exception afforded ordinary business enterprises would adequately serve the needs of the medical profession. A rule of law which declared that any concerted action by doctors directed against a drug manufacturer or an uncertified hospital would violate the antitrust laws and allowed only such a narrow defense would undoubtedly deter good faith efforts by medical practitioners to preserve and improve the quality of medical services.

C. Petitioners And The Department Of Justice As *Amicus Curiae* Concede That The Professions Require Specialized Treatment Under The Antitrust Laws.

Both petitioners and the Department of Justice concede that, to some extent, the antitrust laws must differentiate between the professions and ordinary trade or commerce. Petitioners, in their petition for a writ of certiorari, have argued that it is only "entrepreneurial" activity—not "professional" activity—that is subject to the antitrust laws. (Petition at 20.) Petitioners' brief presently before this Court takes an additional approach which also implicitly recognizes the need for specialized treatment of the professions. Petitioner would concede that "Outside the area of *per se* violations . . . the courts may properly consider the professional status of the participants." (Brief at 45.) Alternatively, petitioners would distinguish between the "commercial" and "non-commercial" aspects of legal practice as a part of the proper interpretation of the Sherman Act. (Brief at 41-43.)

The Department of Justice, in its brief *amicus curiae* supporting the petition for a writ of certiorari, has acknowledged that it may be appropriate to modify the "traditional criteria in applying the Sherman Act to a profession," but has urged that there is no occasion to do so when dealing with fee schedules. (Brief at 7-8.) The Department would adopt a "commercial/non-commercial" distinction in applying the antitrust laws. (Brief at 6-7.) The Department's brief *amicus curiae* on the merits also supports such a distinction. (Brief at 28.)

As demonstrated *infra*, the distinctions offered by petitioners and the Department do not survive careful analysis. Nonetheless, it is significant for present purposes that even these parties agree that the professions require a different

application of, or an exclusion from, the antitrust laws. The only disagreement concerns the criteria to be employed to determine the scope of that exclusion or application.

II. ANY APPLICATION OF THE ANTITRUST LAWS TO THE PROFESSIONS MUST BE CONSISTENT WITH THE NEED FOR SPECIALIZED RESTRICTIONS ON PROFESSIONAL CONDUCT.

A. A Workable Exclusion Cannot Be Confined To "Non-commercial" Activities.

Petitioners and the Department of Justice argue that whatever may be the justification for a professional exclusion, no such exclusion should encompass "entrepreneurial" or "commercial" activities. This approach, while superficially appealing, should be rejected for at least two reasons.

In the first place, it makes little sense to distinguish between "commercial" and "non-commercial" or "entrepreneurial" and "professional" aspects of legal practice. Every service performed by an attorney for a private client is of necessity both commercial and professional. Consequently, every limitation on professional conduct (whether it be a prohibition against conflicts of interest or a fee schedule) is in some sense commercial. At the same time, virtually all such limitations serve professional rather than commercial purposes.[3]

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[3] There is one use of a commercial/non-commercial distinction which may provide a workable test. *Marjorie Webster Jr. Col.* v. *Middle States Association of C. & S.S.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) contains *dicta* to the effect that restraints on professional services which serve solely commercial purposes may violate the antitrust laws. 432 F.2d at 654-55. Assessing restrictions on professional conduct by determining whether they serve "professional" or "commercial" *purposes* would closely parallel the proposed test advanced by *amicus* in this brief. Such a test is very different from an attempt to classify *aspects* of the practice as commercial and determining that the antitrust laws are fully applicable to such aspects regardless of the professional values served by restrictions on such aspects.

Under these circumstances, the offered distinction would not be a workable principle of decision. Confronted with various challenges to restrictions on professional conduct, lower courts would be unable rationally and consistently to determine which practices were commercial and which were professional.

More importantly, even if a principled method of classifying commercial and non-commercial aspects of the practice could be elaborated, some of the most commercial elements of the practice are the very aspects that require the most circumspect professional regulation. Prohibitions against excessive fees, fee splitting or contingent fees in criminal matters are every bit as commercial as fee schedules. Indeed, they are all part of exactly the same "aspect" of the practice—the determination of the fee charged a client. Similarly, it is difficult to discern why restrictions on solicitation are any less commercial than restrictions on the manner in which fees are established.

Equally unworkable is petitioners' suggestion that the antitrust laws should not apply to mere restraints on competition among attorneys, but should apply if those restraints affect the public or some aspect of commerce. (Petition at 19; Brief at 39-41.) The flaw in this approach is that almost every restriction upon professional conduct affects the relations of attorneys with other parties and hence indirectly affects the public.[4] Rules relating to barratry, champerty, solicitation and fee splitting have a direct impact upon clients and prospective clients. Yet, such an impact should not be sufficient to cause the antitrust laws

[4] Petitioners find such an effect in the present case only in that the restraint allegedly operated "to limit the choice of home buyers in the Northern Virginia-Washington D.C. area and to restrict the movement of interstate mortgage money." (Brief at 40.)

to supersede legitimate restrictions traditionally imposed on the professions.

Finally, petitioners assert that the antitrust laws should be fully applicable to restrictions on professional conduct which would be per se violations in the context of ordinary commerce. In petitioners' view, the values of professional regulation would be adequately served by applying the rule of reason to all other restrictions. However, as demonstrated *supra* at pp. 7-9, many of the restrictions on professional conduct long deemed essential by society could be characterized as per se violations under traditional antitrust analysis. Moreover, the mere application of the rule of reason without some sort of test similar to the one advocated by *amicus* would provide no guidance for lower courts and would require each future case to be decided on an essentially *ad hoc* basis.

B. The Antitrust Laws Should Be Applied Only To Those Restrictions On Professional Conduct Which Are Not In Furtherance Of Legitimate Regulatory Objectives And Which Have The Purpose Or Effect Of Restraining Commerce.

The need for limitations on professional conduct could be harmonized with federal antitrust policy by the adoption of the following test:

> Actions which restrict professional conduct are permissible under the antitrust laws unless
>
> 1. the actions are not in furtherance of legitimate objectives of professional regulation; and
> 2. the actions have the purpose or effect of restraining commerce.[5]

[5] This test must necessarily include this second element since an insignificant restraint which may not be justified by legitimate self-regulatory objectives should not be illegal unless it has the purpose or effect of restraining commerce.

This test serves the needs of the antitrust laws while preserving the objectives of professional regulation such as maintenance of the quality of services and preservation of the integrity of the profession.[6] *See, generally,* Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason,* 66 Colum. L. Rev. 1486 (1966).

In the somewhat analogous area of industry self regulation, the courts have generally sustained the legality of practices which are consistent with policies underpinning self regulation. For example, courts have held that the antitrust laws do not prohibit certain disciplinary or exclusionary rules of professional athletic associations. *See, e.g., Deesen* v. *Professional Golfers' Ass'n of America,* 358 F.2d 165 (9th Cir.), *cert. denied,* 385 U.S. 846 (1966); *Molinas* v. *National Basketball Ass'n,* 190 F. Supp. 241 (S.D.N.Y. 1961). Courts have also supported the legality of a trade association's motion picture rating code, *Tropic Film Corp.* v. *Paramount Pictures Corp.,* 319 F. Supp. 1247 (S.D.N.Y. 1970), as well as the legality of a board of trade's restrictive bylaw allocating selling time. *Roberts* v. *Fuquay-Varina Tobacco Board of Trade, Inc.,* 405 F.2d 283 (4th Cir. 1968). In none of these more commercial contexts is the public interest in the restrictions as great or as long standing as in controls upon professional conduct.

All exemptions from, exclusions from, or specialized applications of, the antitrust laws are justified by social values conflicting, in part, with those laws; but each may be lost if conduct is not consistent with policies underlying

[6] Such a test would require the courts to assess the purposes and objectives of particular restrictions on professional conduct. Such an assessment is commonplace in decisions under the Sherman Act. Contrary to the suggestion of the Department of Justice at page 27 of its Brief *Amicus Curiae,* such a test would not turn on the actual motivation of the parties promulgating a particular restriction although such motivation could of course constitute evidence of the purpose of the restriction.

the exemption, exclusion or specialized application. *E.g., Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). Concerted efforts to influence legislative or administrative action are exempt from the antitrust laws, *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); but the exemption has been lost by persons who abused their right of access to the government since such conduct was not within the legitimate objectives of the exemption. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972). Similarly, the Webb-Pomerene Act, 15 U.S.C. §§ 61-65, exempts certain restrictive practices arising in the course of export trade. Its purpose is to permit American firms to compete in a cartelized world; and accordingly, the exemption can be lost if the export mechanism is used to regulate domestic supply and price. *United States* v. *Phosphate Export Ass'n,* 393 U.S. 199, 207 (1968); *United States* v. *United States Alkali Export Ass'n,* 86 F. Supp. 59 (S.D.N.Y. 1949). Finally, the purpose of the labor exemption is to facilitate and encourage the collective determination of wages and working conditions. The exemption has thus been denied "independent contractors," *United States* v. *Hutcheson,* 312 U.S. 219 (1941), as well as a union collaborating with an employer to destroy the employer's competitors. *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965).

The proposed test resembles the approach used in the exemption cases as well as the approach used in the trade association cases. It may be viewed either as a limited exclusion of the professions from the antitrust laws or merely as a formula for modifying the criteria which are used in applying the antitrust laws to ordinary trade or commerce. In either event, its function is to reconcile competing social values.

Petitioners have argued that the creation of an exemption for the legal profession from the Sherman Act is the

exclusive province of Congress and not for the courts. (Brief at 32-34.) The adoption of the proposed test, however, would not require the creation of such an exemption, but would merely constitute an authoritative determination of the meaning of the very general language of the antitrust statutes. The Court is not confronted with the case of an industry clearly within the scope of the antitrust laws for which a specialized exemption must be created. *E.g., Parker* v. *Brown,* 317 U.S. 341 (1943). Rather, the Court is faced with the threshold question of whether the antitrust laws were ever intended to apply to the legal profession, and if so, the manner in which they should be so applied.[7] Such judicial construction of a statute has always been held to be within the legitimate powers of the courts. *See Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.,* 305 U.S. 315 (1938); *Atlantic Cleaners & Dyers, Inc.* v. *Leader,* 286 U.S. 427 (1932).

Petitioners have also argued that there is no need for an exclusion or specialized rule of application since activities of the professions properly regulated by the states would already be exempt under *Parker* v. *Brown,* 317 U.S. 341 (1943). (Brief at 45.) Such an argument, however, ignores both the history and realities of professional self regulation. Private national bar associations such as *amicus* have taken the lead in developing ethical standards and in harmonizing standards proposed and developed by state associations. More importantly, many states have chosen to regulate the legal profession by means of private or quasi-private state and local bar associations. The Sherman Act

[7] While *amicus* recognizes that the various judicial statements, cited *supra* at p. 4, to the effect that the professions are not trade or commerce do not constitute binding precedent, it can scarcely be maintained in light of those statements that the professions are clearly within the intended scope of the Sherman Act. Indeed, it is highly unlikely that the Congress which enacted the Sherman Act ever contemplated that it would be applied to the ethical regulation of learned professions.

was not intended and should not be interpreted to nullify such a political choice made by state governments. Moreover, the medical profession and the public interest require, in certain contexts, private peer review; and given the rapidly developing area of prepaid legal services programs, the legal profession may need to employ such review in the future.

In sum, codes of professional ethics and other self regulation are a crucial component of an integrated and complementary scheme for controlling professional conduct, maintaining standards, and protecting the public. The proper functioning of this regulatory scheme would be seriously impaired by a decision of the Court which failed clearly to recognize the particular status of the professions under the antitrust laws. Application of the mechanical tests suggested by petitioners or adoption of an entirely case-by-case mode of analysis without any clear governing principle would chill good faith efforts to control professional conduct, as well as discourage imaginative efforts to raise future standards of professionalism.

CONCLUSION

It is necessary to recognize that there are many kinds of fee schedules including schedules designed to limit excessive fees, schedules which influence the level of minimum fees, schedules used by courts in awarding fees and schedules which merely constitute historical information concerning fees. Because the policies supporting various schedules are different, each requires separate analysis. Even explicit "agreements" to set fees must be examined on an individual basis since such agreements may be justified in a few specialized contexts. For example, given the professional obligation to perform certain charitable services, bar associations should be permitted to

sponsor programs under which participating attorneys agree to perform services for low income clients at set token fees even though establishing such fees technically could be an agreement to fix prices. *See, e.g., American Bar News,* Vol. 19, No. 9 (October 1974) at 9. Similarly, the success of consumer sponsored prepaid legal services plans may depend on the agreement of participating attorneys to charge certain established fees for specified services.

While the American Bar Association has in the past supported the use of fee schedules in certain contexts,[8] it has never supported the use of such schedules to fix fees. Indeed, the Association has ruled that adherence to and enforcement of an obligatory minimum fee schedule would itself constitute an unethical practice. (Formal Opinion 28 of the A.B.A. Standing Committee on Professional Ethics, 16 A.B.A. Journal 538 (1930); Formal Opinion 171 of the A.B.A. Standing Committee on Professional Ethics, 23 A.B.A. Journal 643 (1937); Formal Opinion 323 of the A.B.A. Standing Committee on Ethics and Professional Responsibility, 56 A.B.A. Journal 1087 (1970).) The Association does believe, however, that fee schedules and agreements should be analyzed in the same fashion as other limitations on professional conduct. In assessing their legality, the Court should determine whether the justifications for the particular schedules at issue constitute legitimate objectives of professional regulation.

[8] For instance, in 1961 the Association ruled that the habitual charging of fees less than those established in a minimum fee schedule may be evidence of unethical conduct. (Formal Opinion 302 of the A.B.A. Standing Committee on Professional Ethics, 48 A.B.A. Journal 159 (1962).) In 1970, however, the Association clarified this ruling by holding that mere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action. (Formal Opinion 323 of the A.B.A. Standing Committee on Ethics and Professional Responsibility, 56 A.B.A. Journal 1087 (1970).)

In determining the application of the antitrust laws to the professions, the social values served by particular restrictions on professional conduct should be carefully considered. Only if the Court finds that the fee schedules challenged in this case are not in furtherance of legitimate objectives of professional regulation and if it finds that the schedules have the purpose or effect of restraining commerce should it hold that the antitrust laws are applicable.

Respectfully submitted,

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LEWIS H. GOLDFARB and RUTH S. GOLDFARB,
individually and as Representatives of
the Class of Reston, Virginia,
Homeowners,
Petitioners,

vs.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,
Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE BAR ASSOCIATION OF SAN FRANCISCO AS AMICUS CURIAE

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB,
individually and as Representatives of
the Class of Reston, Virginia,
Homeowners,
Petitioners,

vs.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,
Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE BAR ASSOCIATION OF SAN FRANCISCO AS AMICUS CURIAE

This brief is filed for the Bar Association of San Francisco, amicus curiae, with the written consent of all parties to this proceeding pursuant to Rule 42 of the Court.

INTEREST OF AMICUS CURIAE

The Bar Association of San Francisco is a nonprofit corporation organized under the laws of the State of California, each of whose more than 4,000 members is a member of the integrated bar of the State of California. The purposes, in part, of the Bar Association of San Francisco are:

> "To further the honor, dignity and public usefulness of the legal profession; to increase the profession's effectiveness in promoting the sound administration of justice; to act in the interest of maintaining a skilled, humane and independent judiciary; * * * to provide an organization for collective action or expression in matters germane to the aforesaid purposes."

The present case presents important issues concerning the relationship between the antitrust laws and professional conduct which will necessarily affect state and local bar associations and their members. The significance of the present case extends beyond the specific issues presented by the parties.

Amicus is particularly concerned about the effect of any decision by this Court on joint conduct by bar associations and their members. *Amicus* does not employ directly or indirectly any minimum fee schedule and does not urge that any such device is immunized from antitrust considerations simply because it is professionals who employ it. However, *amicus* has serious concern for the preservation of many activities which have historically been utilized by the organized bar to aid legitimate public interest—non-mercantile—objectives, including the providing of low-cost legal services to those unable to pay a competitive fee.

Thus, *amicus* presently operates a Lawyer Referral Service which helps to deliver legal services to persons who would not otherwise receive such services, including those unable to pay the regular fees charged by private practitioners. The Lawyer Referral Service and a number of other such Services throughout the country have already instituted, or contemplate, plans whereby legal representation is supplied to the needy at fixed token fees, such fees in all instances far below those regularly charged by private practitioners. In addition, legal aid organizations, prepaid legal services and other groups within the legal profession are also involved in the joint delivery of low-cost legal services. Many of these efforts involve, and indeed require, joint arrangements as to fees in order to miniminze the cost of legal services.

The concern of *amicus* is that this Court be aware of the full ramifications of any decision that the legal profession is to be subjected to the full scope of the Federal antitrust laws and treated as if it were in all respects a commercial business enterprise. Petitioner seeks to apply to the legal profession the *per se* proscription against price-fixing contained in section 1 of the Sherman Act (Petr.Br., p. 45). Such price-fixing proscriptions have been held to apply equally to maximum prices as to minimum (*Kiefer-Stewart Co. v. Seagram & Sons* (1951) 340 U.S. 211), and thus would endanger the extensive public interest fee-limiting plans by which legal services can be delivered at low cost to the needy through joint action of attorneys and bar associations. *Amicus* urges that any application of the Federal antitrust laws to the legal profession allow for proper professional obligations and standards, includ-

ing low-cost "maximum fee" plans. If such plans are not totally exempt, they should be reviewed only as to their reasonableness in light of proper professional objectives and state regulations.

QUESTION PRESENTED

Amicus will restrict its brief to the specific issue of whether, and to what extent, the restrictions of the Sherman Act should be applied to the legal profession and the ramifications of that application on the profession's efforts to deliver low-cost legal services.

SUMMARY OF ARGUMENT

The extensively state regulated and court supervised activities of the legal profession should not be subjected to the same antitrust considerations as commercial business activities. Professional and ethical considerations should be accommodated in reconciling the scope of the Federal antitrust laws to state regulation of professional activities. Such reconciliation should allow for review of the reasonableness of the professional regulation and deference to a state regulatory agency, at least as a matter of primary jurisdiction. The long-standing hesitancy to apply the full scope of the antitrust laws to legal and other professions further evidences the need for a reasoned analysis before enjoining professional action. Broad-brush, *per se* restrictions should be avoided in preference to examination of the reasonableness of specific professional activities. In particular, professional activities in

the public interest, many of which necessarily involve joint attorney agreements and participation, should either be exempted from antitrust considerations or at least subjected to analysis which weighs the benefits against any theoretical effect on competition.

ARGUMENT

I. SUBJECTING THE LEGAL PROFESSION'S JOINT ACTION TO THE FULL SCOPE OF THE ANTITRUST LAWS WOULD ENDANGER EFFORTS TO REDUCE FEES AND OTHERWISE SERVE THE PUBLIC.

The contentions of Petitioners and the Department of Justice as *amicus curiae* are postulated on their claim that by subjecting the legal profession, including bar associations, to the full scope of the Sherman Act the public interest will be served by necessarily reducing fees charged by lawyers (Petr.Br., pp. 43-44; Dept. of Justice Br., pp. 2-4, 12-19). On the contrary, unrestrained application of the Sherman Act would harm the legal profession and the public interest and frustrate, not aid, attempts to provide legal services at lower fees to those who cannot pay a competitive price for those services.

The delivery of low-cost legal services necessarily involves concerted action among members of the legal profession, as reflected in group legal services, prepaid legal services, legal aid organizations and lawyer referral services. The need for more extensive legal services to those unable to pay competitive rates has been previously noted by the Court (e.g., *Gideon v. Wainwright* (1963) 372 U.S. 335; *Argersinger v. Hamlin* (1972) 407 U.S. 25); that need

is at least in part being met by groups of attorneys and laymen combining to achieve low-cost services (*United Transportation Union v. Michigan Bar* (1971) 401 U.S. 576; *Mine Workers v. Illinois Bar Assn.* (1967) 389 U.S. 217. The duty of attorneys to provide such low-cost legal services is well-established (*United States v. Dillon* (9 Cir. 1965) 346 F.2d 633, certiorari denied (1966) 382 U.S. 978; Brennan, The Responsibilities of the Legal Profession, 54 A.B.A.Jour. (1968) p. 121; A.B.A. Code of Prof. Resp., Canon 2, EC 2-16).[1]

Thus, the Lawyer Referral Service performs its public function by providing that member-attorneys deliver a standard legal service (normally a one-half hour consultation) for a set fee, such as ten or fifteen dollars, well below the customary range of fees charged. Service at that fee is publicized and is available from all attorneys participating in the Referral Service (see Christensen, Lawyers for People of Moderate Means (1970), p. 175; Hearings before the Subcommittee on Representation of Citizen Interests of the Committee on the Judiciary, U.S. Senate, 93d Cong., 1st Sess., pp. 1618-1626, 1664-1679). It is estimated that more than 275 such referral services are in operation in the United States (American Bar Association, Lawyer Referral Service Bulletin, Spring 1973, p. 10). Additional programs involve participating attorneys' agreements to provide legal services to the indigent and

[1]It has been estimated that 30 million families whose incomes fall between $4,000 and $20,000 have been unable because of costs to receive proper legal advice (Denney, A New Idea for a Public Interest Law Institution, 60 A.B.A.Jour. (1974) 1252; Group Legal Services, 39 Cal.State Bar Jour. (1964) 639, 652-659).

nearly indigent at a minimal fixed fee (e.g., American Bar News, Vol. 19, No. 9 (1974) at 9).[2] Similarly, consumer sponsored prepaid legal services may also depend upon arrangements by which participating attorneys agree as to the fees to be charged, and thus provide some cost control to plans designed to minimize the cost of legal services (American Bar Association, Revised Handbook on Prepaid Legal Services (1972) pp. 67-68, 272; Meserve, Our Forgotten Client: The Average American, 57 A.B.A. Jour. (1971) 1092, 1093-1094).

The professional obligation of attorneys to provide legal services, recognized and enforced by the courts and subject to extensive state legislation, distinguishes the profession from ordinary commercial business entities. Such activities by the legal profession should not be restricted or eliminated by application of the Sherman Act or other Federal antitrust laws. The possibility of such an application has a necessarily chilling effect on the development of legal services plans and the delivery of legal services, thereby conflicting with First and Sixth Amendment rights (*United Transportation Union v. Michigan Bar* (1971) 401 U.S. 576, 580-586; *Mine Workers v. Illinois Bar Assn.* (1967) 389 U.S. 217, 221-225).

[2]Last year the Referral Service of *amicus* supplied counsel for approximately 7,500 individuals, a substantial portion of whom were persons of moderate means. As a part of its function, *amicus* has proposed to institute a public-interest program whereby individuals whose incomes are not more than 25% above Neighborhood Legal Assistance Foundation maximum limits would receive marital dissolutions or nonbusiness insolvency advice for a maximum fee of $200, well below the range of fees normally charged by private practitioners. Institution of such plan has been prevented due to speculation about the application of antitrust laws to public interest aspects of the legal profession.

II. THE FEDERAL ANTITRUST LAWS SHOULD NOT BE APPLIED TO THE LEGAL PROFESSION IN THE SAME MANNER AS THEY ARE APPLIED TO COMMERCIAL BUSINESS ORGANIZATIONS.

This Court and others have properly recognized that the professions should not be subjected to applications of the Federal antitrust laws in the same manner as commercial business enterprises:

> "We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession" (*United States v. Oregon Med. Soc.* (1952) 343 U.S. 326, 336).

Limitations have properly been placed on the extent to which courts have applied the antitrust laws outside normal commercial dealings:

> "The Court in *Apex* [*Apex Hosiery Co. v. Leader* (1940) 310 U.S. 469] recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives" (*Klor's v. Broadway-Hale Stores* (1959) 359 U.S. 207, 213, n. 7).

The antitrust laws were "tailored * * * for the business world" (*Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127, 141), and the restraint of trade provisions of section 1 of the Sherman Act should be interpreted in light of the aims and objectives of that legislative purpose (*Apex Hosiery Co. v. Leader* (1940) 310 U.S. 469, 489).

The proper reluctance to apply the full scope of the antitrust laws to all professional activities is reflected in the few cases in which courts have been asked to apply those antitrust laws to the professions (e.g., *Lincoln Rochester Trust Co. v. Freeman* (1974) 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480; *Marjorie Webster Jr. Col., v. Middle States Ass'n of C. & S. S.* (D.C.Cir. 1970) 432 F.2d 650, certiorari denied (1970) 400 U.S. 965; *Riggall v. Washington County Medical Society* (8 Cir. 1957) 249 F.2d 266, certiorari denied (1958) 355 U.S. 954; *Northern California Pharmaceutical Ass'n v. United States* (9 Cir. 1962) 306 F.2d 379, certiorari denied (1962) 371 U.S. 862).

III. THE HIGHLY REGULATED NATURE OF THE LEGAL PROFESSION SHOULD BE CONSIDERED IN ANY APPLICATION OF THE ANTITRUST LAWS; THE POLICIES BEHIND THAT REGULATION SHOULD BE CONSIDERED IN APPLYING THE ANTITRUST LAWS.

The highly regulated nature of the legal profession is undisputed (see, e.g., the State Bar Act, Cal.Bus.&Prof. Code, §§ 6,000, et seq.):

> "[T]he bulk of State Bar activities serve the function * * * of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy" (*Lathrop v. Donohue* (1961) 367 U.S. 820, 843).

Regulation under state statutes by state agencies and state courts should not be superseded by the antitrust laws. Rather, there should be reconciliation to the extent that the antitrust laws are to be applied to professional activities. Such extensive state regulation should be considered in applying the Sherman Act and should at least result in primary jurisdiction in appropriate cases for state agencies (*Industrial Communications Systems, Inc. v. Pacific Telephone & Telegraph Co.* (9 Cir. 1974) ..... F.2d ....., 1974 CCH Trade Cases, par. 75,291; see also *Ricci v. Chicago Mercantile Exchange* (1973) 409 U.S. 289, 306-308; *Far East Conf. v. United States* (1952) 342 U.S. 570; *Carter v. American Telephone & Telegraph Company* (5 Cir. 1966) 365 F.2d 486, 494-497, certiorari denied (1967) 385 U.S. 1008).

The proper reconciliation of the antitrust laws to state regulation of the legal profession demands a careful review of the professional objectives before overriding those objectives because of antitrust considerations:

> "Contrary to the conclusions reached by the courts below, the proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted" (*Silver v. New York Stock Exchange* (1963) 373 U.S. 341, 357).

This reconciliation can be best accomplished by reviewing the reasonableness of the professional activities at issue, not by applying broad *per se* rules (Note, Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination, 58 Colum.L.Rev. (1958) 673, 681-683, 701). Where extensive regulation is already present,

courts have properly reviewed the reasonableness of the challenged action.[3]

Because of the strong public interest supporting the vast proportion of the legal profession's standards and procedures, proscriptions of those activities should not occur until their reasonableness has been investigated (e.g., *White Motor Co. v. United States* (1963) 372 U.S. 253; *Worthen Bank & Trust Co. v. National Bankamericard Inc.* (8 Cir. 1973) 485 F.2d 119, 125-130, certiorari denied (1974) 415 U.S. 918). Specifically, where there is a proper public purpose, and little possibility of countervailing "competitive" injury or effect (as in bar association sponsored fee arrangements used to deliver low-cost legal services), such activities should be outside the scope of the Sherman Act.

Even the single case holding that the legal profession is subject to antitrust restriction clearly recognized the necessary role of the rule of reason in reconciling professional regulation with the antitrust laws (*United States v. Oregon State Bar* (D.Ore. 1974) ..... F.Supp. ....., Petr.Br., Ad B-17, 20; see also *United States v. National Society of Professional Engineers* (D.D.C. 1974) ..... F.Supp. ....., 1974 CCH Trade Cases, par. 75,415). To apply a *per se* rule in all cases where professional fees are involved would be improper, and would ignore the time honored professional obligations involved and the

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[3]*Silver v. New York Stock Exchange* (1963) 373 U.S. 341; *Deesen v. Professional Golfers' Association of America* (9 Cir. 1966) 358 F.2d 165, certiorari denied (1966) 385 U.S. 846; *United States v. Morgan* (S.D.N.Y. 1953) 118 F.Supp. 621; *United States v. Insurance Bd.* (N.D.Ohio 1960) 188 F.Supp. 949; *United States v. United States Trotting Ass'n* (S.D.Ohio 1960) 1960 CCH Trade Cases, par. 69,761.

lack of improper purpose or effect in such areas as the delivery of low-cost legal services. Rather, such public interest activities insure the right of citizens to counsel and access to the courts, and should be either exempted from the Sherman Act *(Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127, 137-138) or should be tested by the traditional rule of reason, determining whether any theoretical restraint is ancillary to proper professional and public interest objectives (e.g., *Chicago Board of Trade v. United States* (1918) 246 U.S. 231, 238; *United States v. Morgan* (S.D. N.Y. 1953) 118 F.Supp. 621, 689).

The opportunity for professional organizations to render public service should be protected by this Court. Thus, if the Court should determine that lawyers' minimum fee schedules cannot withstand antitrust scrutiny, this result can be accomplished while yet preserving public service programs by exempting those activities which are wholly or primarily designed to provide benefits to clients or the public generally. Later cases can, by application of traditional rules, determine whether particular activities serve the public interest and are designed to serve professional concerns, rather than economic self-interest.

As noted by the Court in *Silver v. New York Stock Exchange* (1963) 373 U.S. 341, 360, "under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the * * * [conflicting regulation]." Any application of the antitrust laws must allow proper flexibility for accommodating professional standards and responsibilities *(Lincoln Rochester Trust Co. v. Freeman* (1974) 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480).

CONCLUSION

The question of the application of the antitrust laws to the legal profession is one of first impression. Any decision subjecting the legal profession to the requirements of the Sherman Act and other Federal antitrust legislation should consider the possible effect on public interest delivery of low-cost legal services. The standard to be applied should be flexible enough to accommodate legitimate objectives of professional action and regulations.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,

Petitioners

V.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE NATIONAL ORGANIZATION OF BAR COUNSEL AS AMICUS CURIAE

RICHARD C. MCFARLAIN, *President,*
National Organization of Bar Counsel

IN THE

Supreme Court of the United States

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION OF THE NATIONAL ORGANIZATION OF BAR COUNSEL FOR LEAVE TO FILE BRIEF AMICUS CURIAE

MOTION

Pursuant to Rule 42 of the Rules of this Court, the National Organization of Bar Counsel (NOBC), a non-profit organization, hereby respectfully moves this Court for leave to file the attached brief *amicus curiae* in the above-captioned case. The brief supports the position that the Sherman Act cannot constitutionally apply to fees of attorneys or fee schedules promulated by or for attorneys. Of course, this constitutional argument is only necessary if it is assumed, *arguendo*, that Congress intended to exercise its Commerce power under the Sherman Act over such fees or fee schedules. Because the latter questions (including the "state action" exemption question) have been adequately briefed by the parties, this brief is confined to arguments in support of the constitutional principle asserted above.

The attorney for petitioners, Alan B. Morrison, Esquire; the attorney for respondent Virginia State Bar, the Office of Attorney-General of Virginia; and the attorneys for respondent Fairfax County Bar Association, Hunton, Williams, Gay and Gibson, have consented to the filing of this brief by the NOBC.[1] The decision to submit the *amicus* brief on behalf of the NOBC was made by majority vote of the Executive Committee of the NOBC, said majority consisting of Richard C. McFarlain, President, Albert L. Bell, Vice-President, and Richard H. Senter, Immediate Past President. The remaining two members of the Executive Committee, Fred Grabowsky, Treasurer, and James R. Wrenn, Jr., Secretary, abstained from said Executive Committee vote.

The interests of the NOBC as *amicus curiae* and the issue addressed are set forth at the beginning of the attached brief.

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1. Letters from counsel have been supplied to the Clerk of this Court together with this motion and brief.

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---

BRIEF FOR THE NATIONAL ORGANIZATION OF BAR COUNSEL AS AMICUS CURIAE

THE INTEREST OF THE AMICUS CURIAE

The National Organization of Bar Counsel (NOBC) is a non-profit, professional association of counsel to bar disciplinary organizations in thirty states. The one-hundred-nine-member NOBC is funded by annual dues paid by each disciplinary organization represented therein.

The NOBC was founded in February, 1965 during the American Bar Association (ABA) winter meeting. Although the NOBC is affiliated with the ABA and meets semi-annually in conjunction with the ABA, the NOBC is not a part of the ABA, nor is it subject to the authority or policies of the ABA.

The purpose of the NOBC is to serve as a vehicle for improving and maintaining the effectiveness of the discipline of the legal profession throughout the country. Most recently, the NOBC "Special Committee on Watergate" furnished valuable and effective assistance to disciplinary counsel in the respective states by arranging and coordinating the dissemination of information from the Senate "Watergate Committee" and the Watergate Special Prosecutor regarding the involvement of attorneys in improper conduct.

Two of the NOBC's charter members, John G. Bonomi (a former President of the NOBC) and Fred B. Hulse, served on the ABA "Special Committee on Evaluation of Disciplinary Enforcement" (popularly known as the "Clark Committee"), chaired by the Honorable Tom C. Clark, former Associate Justice of this Court.

As a national, professional organization of bar disciplinary counsel from thirty states, the NOBC has a unique interest in the proper resolution of the paramount issue herein. Furthermore, because of its specialized function, the NOBC is uniquely qualified to assist the Court in focusing objectively on that issue.

THE ISSUE TO WHICH THIS BRIEF IS ADDRESSED

The argument in this brief is predicated upon an assumption, *arguendo*, that the legal fees and/or fee schedules

in question have substantial impact on interstate commerce and that Congress intended the Sherman Act to apply to such fees and/or fee schedules. Because resolution of the issues in this case on the basis of the argument advanced in this brief would preclude a finding that the Sherman Act is applicable, this brief does not address either the "state action" exemption or the "learned profession" exemption.

The paramount issue in this case is whether regulation of particular professional conduct of attorneys is a constitutionally permissible scope of activity by Congress, when such professional conduct is inextricably subject to regulation by the judiciary. This brief argues that the Separation of Powers doctrine and the Tenth Amendment preclude subjugation of such conduct to regulation under the Sherman Act.

SUMMARY OF ARGUMENT

The Separation of Powers doctrine and the Tenth Amendment to the United States Constitution prohibit Congress from exercising judicial power not conferred on it by the Constitution. *Jurney* v. *MacCracken*, 294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802 (1935); *Marshall* v. *Gordon*, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881 (1917); *In re Chapman*, 166 U.S. 661, 17 S.Ct. 677 (1897); *Kilbourn* v. *Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881); *Anderson* v. *Dunn*, 6 Wheat 205, 5 L.Ed. 242 (1821). Regulation of conduct—in court or out of court—relating to one's competence and/or fitness to practice law is an "exclusively judicial function" exercised through inherent judicial power. *Lathrop* v. *Donahue*, 367 U.S. 820, 81 S.Ct. 1826 (1961); *Theard* v. *United States*, 354 U.S. 278, 77 S.Ct. 1274 (1957); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Ex Parte Secombe*, 19

Howard 9, 15 L.Ed. 565 (1856); *Cantor* v. *Supreme Court of Pennsylvania*, 487 F.2d 1394 affirming *per curiam* the decision of the District Court for the Eastern District of Pennsylvania reported at 353 F.S. 1307 (1973); [State supreme court decisions omitted here—see footnote 4, *infra*.].

The amount of a particular fee set by an attorney for his services is subject to the authority and special scrutiny of the judiciary, and the factors to be used in setting such fee—as determining the "reasonableness" thereof—are prescribed by the judiciary. *United States* v. *Equitable Trust Co. of New York*, 283 U.S. 738, 51 S.Ct. 639 (1931); *Nicholson* v. *Shockey*, 192 Va. 270, 64 S.E.2d 813 (1951); *Stiers* v. *Hall*, 170 Va. 569, 197 S.E. 450 (1938); *Rules of the Supreme Court of Virginia, Part Six, Section II, Canons 12 & 13* [171 Va. xxii, xxiii (1938)] *superseded* by *Section II, Ethical Considerations 2-16 through 2-20, 2-24 & 2-25* and *Disciplinary Rules 2-106 and 2-110(A)(3)* [211 Va. 295 at 301-304, 313-315 (1971)].

This Court has recognized evidence of the legal fees "ordinarily" or "usually" charged by local attorneys as a proper measure for establishing the reasonableness of a fee charged by a particular attorney. *Stanton* v. *Embrey*, 93 U.S. 548 (1876).

Because attorney's fees are demonstrably and inextricably subject to judicial control, then *a fortiori* under the principle applied in *Anderson*, 6 Wheat 205, *supra*, and subsequent cases Congress is without power to subject such fees or schedules for such fees to regulation under the Sherman Act.

ARGUMENT

The Separation of Powers Doctrine and the Tenth Amendment prohibit Application of the Sherman Act to the Regulation of Attorneys' Fees Through Fee Schedules, Whether They be "Minimum," "Maximum," "Customary," "Ordinary," "Usual," "Recommended," "Reasonable," or "Suggested" Fee Schedules.

The constitutional principle prohibiting the exercise of judicial power by Congress has been applied by this Court in numerous cases. *Jurney* v. *MacCracken*, 294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802 (1935); *Marshall* v. *Gordon*, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881 (1917); *In re Chapman*, 166 U.S. 661, 17 S.Ct. 677 (1897); *Kilbourn* v. *Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881); *Anderson* v. *Dunn*, 6 Wheat 205, 5 L.Ed. 242 (1821). The common principle applied in those cases is that Congress cannot constitutionally exercise any judicial power not expressly conferred upon it by the Constitution or *necessarily implied* to enable Congress to *function as a legislative body*. The only such implied judicial power recognized by this Court in the aforesaid cases is the power to summarily punish non-members of Congress for contemptuous conduct which threatens the legislative functioning of Congress. *Jurney*, 294 U.S. at 143-144; *Marshall*, 243 U.S. at 542-546; *Chapman*, 166 U.S. at 667-669; *Kilbourn*, 103 U.S. at 192-193, 197, 200; *Anderson*, 6 Wheat at 230-231. Furthermore, the exercise of such implied power is constitutionally limited to ". . . the least possible power adequate to the end proposed." *Anderson*, 6 Wheat at 231. This latter limitation was recently followed by this Court in applying the *Anderson* test to the exercise of summary contempt power by the Wisconsin Legislature in *Groppi* v. *Leslie*, 404 U.S. 469 at 507, 92 S.Ct. 582 at 588, 30 L.Ed.2d 632 (1972), wherein the state legislature had summarily confined Groppi for

contempt without notice and two days after the alleged contemptuous conduct.

It is well-settled by the overwhelming weight of authority that regulating the professional conduct of attorneys is an "exclusively judicial function" as stated by this Court in *Ex Parte Secombe*, 19 Howard at 13. [See footnote No. 4, *infra*, for additional authorities.] Although rules of a state supreme court integrating the bar have been considered "legislative in nature" and "state action" for purposes of review by this court under 28 U.S.C. §1257(2)[2], *Lathrop* v. *Donahue*, 367 U.S. at 824, the *power* exercised thereby is *judicial* in nature[3]. *Lathrop*, at 826. The overwhelming weight of authorities established beyond serious doubt that such power is judicial in nature[4].

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2. In *Lathrop*, the Court found controlling its prior construction of a similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, that "Any enactment from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this Court. *Williams* v. *Bruffy*, 96 U.S. 176, 183, 23 L.Ed. 716 (1877).

3. Just as Congress has implied power, in its grant of legislative power, to engage in certain actions which are judicial in nature in order to exercise its legislative power [*Jurney*, 294 U.S. at 143-144; *Marshall*, 243 U.S. 521; Chapman, 166 U.S. at 667-669; *Kilbourn*, 103 U.S. at 192-193, 197, 200; *Anderson*, 6 Wheat at 230-231], the judiciary necessarily has implied power, in its grant of judicial power, to engage in certain actions which are "legislative in nature" in order to exercise its judicial power.

4. *In the matter of Reed*, 396 U.S. 274, 90 S.Ct. 562 (1970), affirming *per curiam* an appeal from a decision by the Delaware Supreme Court upholding its inherent power to require by rule of court contributions by Delaware attorneys to a client security fund as a requisite to maintaining their licenses to practice law, 257 A.2d 382 (1970); *Lathrop* v. *Donahue*, 367 U.S. at 843, 81 S.Ct. at 1838; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 at 248 (1957); *Theard* v. *United States*, 354 U.S. 278 at 282, 77 S.Ct. 1274 at 1276 (1957); *Powell* v. *Alabama*, 287 U.S. 45 at 73 (1932); *Ex Parte Wall*, 107 U.S. 265 at 273

Because the regulation of the professional conduct of attorneys is a function performed through the exercise of judicial power, it is clear that proper application of the *Anderson* principle, *supra*, precludes subjugation of the *professional conduct* of attorneys (i.e., conduct inextricably subject to judicial control) to regulation by Congressional legislation not in strict conformity with asserted judicial regulatory schema over the same conduct. To resolve the issue in the instant case without negating the aforesaid *Anderson* principle, it is necessary that the inquiry proceed initially upon the question of whether regulation of the particular conduct in question is a judicial function and/or an exercise of judicial power. If it is, then Congressional legislation not in strict conformity with, or in consonant support of, the exercise of such function and power can not constitutionally apply thereto. To inquire initially

---

4. (continued)

(1882); *Ex Parte Garland*, 71 U.S. 333 at 378-379 (1866); *Ex Parte Secombe*, 19 Howard at 13; *Cantor* v. *Supreme Court of Pennsylvania*, 487 F.2d 1394 (1973) affirming without opinion the decision of the District Court for the Eastern District of Pennsylvania upholding the power of the Pennsylvania Supreme Court to integrate the bar by rule of court, 353 F.S. 1307 (1973); *Button* v. *Day*, 204 Va. 547 at 554 (1963); *State Bar Ass'n* v. *Conn. Bank & Trust Co.*, 145 Conn. Supp. 222, 140 A.2d 863 (1958); *Ruckenbrod* v. *Mullins*, 102 Utah 548, 133 P.2d 325 at 330 (1943); *Rhode Island Bar Ass'n* v. *Automobile Service Ass'n*, 55 R.I. 122, 179 A. 139 (1935); *In re Opinion of the Justices*, 279 Mass. 607; 180 N.E. 725, 727-728 (1932); *People* v. *Peoples' Stock Yard State Bank*, 344 Ill. 462, 176 N.E. 901 at 905 (1931); *In re Bozarth*, 178 Okl. 427, 63 P.2d 726 at 728 (1936), citing cases from twenty-five jurisdictions in which inherent judicial power to regulate the practice of law was recognized; *In re Barclay*, 82 Utah 288, 24 P.2d 302 at 303 (1926); *In re Bailey*, 30 Ariz. 407, 248 P. 29 at 30-32 (1926); *In re Olson*, 116 Wash. 186, 198 P. 742 at 743-744 (1921); *In re Platz*, 42 Utah, 132 P. 390 at 392 (1913); Terry Hogwood, "The Supreme Court's Power over Admission and Disbarment: Inherent or Statutory?" 25 Baylor Law Rev. 368, *et seq.* (1973); "Clark Committee" Report, Section II (1970).

whether regulation of such conduct is legislative in nature would be to disregard the overwhelming weight of authority by which regulation of such conduct is clearly presumed to be judicial in nature and to ignore the aforesaid decisions of this Court to the contrary *supra*.

Specifically, setting legal fees is inextricably subject to the regulatory scheme and inherent power of the judiciary. Courts have always had the inherent power to apply special criteria in passing upon the reasonableness of a legal fee, which criteria are substantially different from the criteria ordinarily applied in determining the enforceability of other fees for services. *Nicholson v. Shockey*, 192 Va. 270, 64 S.E.2d 813 (1951); *Stiers v. Hall*, 170 Va. 569 at 579, 197 S.E. 450 (1938). Indeed, this Court has exercised such power by reducing a legal fee from $100,000 to $50,000 in *United States* v. *Equitable Trust Co. of New York*, 283 U.S. 738, 51 S.Ct. 639 (1931).

The parameters universally established by the courts for setting and enforcing legal fees proscribe (1) the *habitual*[5] charging of legal fees so unreasonably low that the furnishing of competent legal services is rendered improbable as a direct result thereof and (2) the charging of *any* fee which

5. The standard imposed by the Virginia Supreme Court regarding unrealistically low fees can only be deemed to prohibit the charging of such fees with such frequency that rendition of competent legal services would be improbable, because the same standard also imposes a duty on attorneys to charge no fee when necessitated by the economic status of the client. Disciplinary Rule 6-101(A)(2) prohibits an attorney from handling a legal matter "without preparation adequate in the circumstances," and the habitual charging of unreasonably low fees would increase the probability of violation of DR 6-101(A)(2). On the other hand, Ethical Consideration 2-25 provides that, ". . . The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of the lawyer."

is excessive[6]. Consequently, because of the subjugation of attorneys' fees to such judicial control, and because attorneys are ethically and legally required to charge "reasonable" fees, their failure to do so not only could prevent them from collecting such fees, but also could serve as a basis for discipline[7].

That regulation of such fees in the instant case is subject to judicial control is established beyond dispute by the Rules of the Supreme Court of Virginia as originally promulgated and subsequently amended. Originally, *Section II* of the *Rules of the Supreme Court of Virginia, Part Six*, provided *inter alia*, as follows:

> Canon 12. Fixing the Amount of the Fee.—In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. . . .
>
> In determining the amount of the fee, it is proper to consider: . . . (3) the customary charges of the Bar for similar services. . . .
>
> In determining the customary charges of the Bar for similar services, it is proper for a lawyer

6. While a lawyer may properly charge an unrealistically low fee (or even no fee), he may *never* properly charge an excessive fee. See Disciplinary Rule 2-106(A) in Appendix "A".

7. The *habitual* charging of unrealistically low fees would, in most cases, create a substantial probability that the attorney would violate Disciplinary Rule 6-101(A)(2), which prohibits an attorney from handling a legal matter "without preparation adequate in the circumstances." [See Appendix "A".] On the other hand, the charging of even *one* "excessive" fee could serve as a basis for disciplinary action under Disciplinary Rule 2-106(A). [See Appendix "A".]

to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee. . . .

171 Va. xxii, xxiii (1938) [Other provisions of Canon 12 and Canon 13 are set forth in Appendix "A" attached hereto.]

Subsequently the Court promulgated the *Virginia Code of Professional Responsibility* as *Section II* in lieu of the original *Section II*. The new *Section II* provides, *inter alia*, as follows:

Ethical Considerations:

2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

2-17 . . . A lawyer should not charge more than a reasonable fee. . . . Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

2-18 The determination of the reasonableness of a fee requires consideration of all relevant

circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state *and local bar associations* provide some guidance on the subject of reasonable fees. . . .

2-25 . . . The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer. . . . Every lawyer should support all proper efforts to meet this need for legal services.

Disciplinary Rules
2-106 Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of fee include the following:

* * * *

(3) The fee customarily charged in the locality for similar legal services.

* * * *

211 Va. 313 (1971) (emphasis added) [Other provisions of the foregoing are set forth in Appendix "A" attached hereto.]

The foregoing provisions of the code of conduct imposed by the Virginia Supreme Court upon its attorneys clearly establish "suggested fee schedules . . . of state and local bar associations" and fees "customarily charged in the locality for similar legal services," *inter alia*, as criteria on which an attorney may rely in attempting to set a "reasonable" fee. Furthermore, in view of the potential for disciplinary acion resulting from the *habitual* charging of unreasonably low fees [See footnote No. 5, *supra*.] or from *any charging* of an "excessive fee" [Disciplinary Rule 2-106(A), *supra*], there would be substantial doubt as to the enforceability of the duty to charge "reasonable" fees were it not for the aforecited criteria, *inter alia*, promulgated by the Court.[8]

In addition to the foregoing authorities supporting reliance on "suggested" or "customary" fee schedules, this Court has upheld in a proceeding to determine the reasonableness of a particular legal fee the admissibility of evidence of local legal fees "ordinarily charged" or "usually charged". *Stanton* v. *Embrey*, 93 U.S. 548 at 577 (1876).

In the instant case, "minimum fee schedules," "suggested fee schedules . . . of state and local bar associations," and "customary" fees have been specifically established by Rules of the Supreme Court of Virginia, as originally promulgated and amended, as criteria, *inter alia*, on which an attorney should rely in setting his legal fees. To reject such substantive guidance as not reasonably related to the judicial function of regulating the conduct of attorneys would be to reject the overwhelming weight of authority in this country and to

8. In absence of such criteria, the prohibition against charging an "excessive" fee might be deemed void for vagueness. See *Connolly* v. *General Construction Co.*, 296 U.S. 385 (1926); *A. B. Small Co.* v. *American Sugar Refinery Co.*, 267 U.S. 233 (1925); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921).

clearly contradict the principle this Court applied in *United States* v. *Equitable Trust*, *supra*, and *Stanton* v. *Embrey*, *supra*.

Respondent Virginia State Bar was created by Rule of the Supreme Court of Virginia in 1938. *Rules of the Supreme Court of Virginia, Part Six*, 171 Va. xvii, *et seq.* (1938). In creating the Virginia State Bar, the Court delegated to its governing body, the Council, general power to administer and enforce the Rules of the Court governing the practice of law and discipline of attorneys in Virginia. *Rules, Part Six, Section IV*, ¶9. Included in said *Rules* were the *Canons of Professional Ethics*, originally promulgated as *Section II* thereof, *supra*, (now replaced by the *Virginia Code of Professional Responsibility*, as *Section II* thereof, *supra*.) In addition, the Court delegated to the Council the power to render "advisory opinions" to active members regarding the propriety, under the *Canons* or the *Code*, of their "contemplated professional conduct." *Rules, Part Six, Section IV*. ¶¶9(i) and 10. Pursuant to the authority conferred under said ¶¶ 9 and 10 the Council promulgated Legal Ethics Opinion No. 98 [construing provisions of the *Canons* then controlling legal fees] in 1960[9] and Legal Ethics Opinion No. 170 [construing provisions of the *Code* controlling legal fees] in 1971[10]. Additionally, pursuant to the powers conferred in said ¶9 and in furtherance of its responsibility under ¶10, the Council promulgated a Report of local minimum fee schedules in 1969[11]. The aforesaid actions of the Council were clearly authorized, if not mandated, by ¶¶ 9 and 10 in view of the provisions of the *Canons* and the *Code* regarding legal fees.

9. See Stipulations, ¶ 20 App. p. 19.
10. See Stipulations, ¶ 20 App. p. 19.
11. Exhibit 27, p. 3, A 25.

In the final analysis the question is *not* whether the actions of the Virginia State Bar were [are] "state action." Rather, the question is whether the actions of the Supreme Court of Virginia and the Virginia State Bar, exercising powers delegated to it by the Court, constitute judicial functions and/or the exercise of judicial power. According to the overwhelming weight of authorities set forth above, an attempt by Congress to legislatively regulate the conduct in question through the Sherman Act, would be an unconstitutional exercise of judicial power. Consequently, it is unnecessary for the same reason to consider whether respondent Fairfax County Bar Association may be exempt from the Sherman Act under a "learned profession" theory.

Finally, the uniqueness of the principle precluding applicability of the Sherman Act to the instant case manifestly provides a proper constitutional deference to the judiciary without diminishing the intended breadth of the Sherman Act to regulate other professions in order to prevent the abuses it was designed to eliminate.

CONCLUSION

For the foregoing reasons this Court should affirm the result obtained in the Court of Appeals below but should predicate said result on the constitutional principle outlined above.

Respectfully submitted,

RICHARD C. MCFARLAIN, *President,*
National Organization of Bar Counsel

12. **Fixing the Amount of the Fee.**—In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. **Contingent Fees.**—Contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges.

171 Va. xxii, xxiii (1938)

Financial Ability to Employ Counsel: Generally

EC 2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to

obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Financial Ability to Employ Counsel: Persons Able to Pay Reasonable Fees

EC 2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC 2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

Financial Ability to Employ Counsel: Persons Unable to Pay Reasonable Fees

EC 2-24 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC 2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every

lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

DR 2-110 Withdrawal from Employment.

(A) In general.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not

been earned.

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

(2) Handle a legal matter without preparation adequate in the circumstances.

211 Va. 295 at 301-304, 313-315 (1971)

MOTION FILED

MAR 31 1975

No. 74-70

In the Supreme Court of the United States

OCTOBER TERM, 1974

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia Homeowners,

Petitioners,

vs.

VIRGINIA STATE BAR and FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE INSTANTER AND PROPOSED BRIEF AMICUS CURIAE OF THE AMERICAN DENTAL ASSOCIATION

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia Homeowners,

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vs.

VIRGINIA STATE BAR and FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION OF THE AMERICAN DENTAL ASSOCIATION FOR LEAVE TO APPEAR AS AMICUS CURIAE

Now comes the American Dental Association, an Illinois not-for-profit corporation, by Owen Rall, Peter M. Sfikas and Paul J. Petit, its attorneys, and moves this Court for leave to file a brief amicus curiae for the following reasons:

1. The American Dental Association, an Illinois not-for-profit corporation, is a voluntary dental association with approximately 105,500 fully privileged members, all of whom are dentists licensed to practice in the various states of these United States, the District of Columbia, the Commonwealth of Puerto Rico or a dependency of the United States. The object of the American Dental Association as set out in its Constitution is:

> "The object of this Association shall be to encourage the improvement of the health of the public, to promote the art and science of dentistry and to represent the interests of the members of the dental profession and the public which it serves." (Constitution of the American Dental Association, Article II)

2. A decision of this Court with respect to whether or not the "learned professions" are subject to the application of the federal antitrust laws will have a material effect on the dental profession especially with respect to the American Dental Association's application of its Principles of Ethics. Likewise, the decision in the instant case will have a material effect on the American Dental Association's constituent and component societies. The constituent societies are composed of the state and other similar jurisdiction dental associations and the component societies are the city or local dental associations of the various states of the United States, the District of Columbia, the Commonwealth of Puerto Rico or a dependency of the United States.

3. Inasmuch as this Court has certified in connection with granting the writ of certiorari the question of whether the minimum fee schedule at issue is exempt from the antitrust laws by reason of the legal profession being a "learned profession" it is suggested that this Court will wish to consider the public policy considerations con-

tained in the proposed amicus curiae brief before reaching its decision especially with respect to the impact that a holding that the learned professions are subject to the antitrust laws will have on the Principles of Ethics of the American Dental Association and all state and local dental associations who are constituent and component societies of the American Dental Association.

4. In preparing the brief amicus curiae, every effort has been made to avoid mere repetition of arguments made by the parties and the amici curiae, the United States Department of Justice and the American Bar Association.

5. The proposed amicus curiae brief relies principally on the effect that this decision will have on the professional and scientific activities of the American Dental Association and its constituent and component societies and, to the extent that a legal argument has been made, it is concise and presents an approach somewhat different from that which has been presented in the other amici briefs.

6. The amici curiae who have already been permitted to file briefs in this Court either represent or deal exclusively with the application of the antitrust laws to bar associations. The American Dental Association believes that this Court should be aware of the impact of this decision on a learned profession other than the legal profession.

7. The Fairfax County Bar Association has not consented to the filing of this proposed amicus curiae brief and it is for this reason that this motion is being filed.

8. This motion and the proposed brief are being filed in support of the respondents' position and are being presented within the time allowed for respondents' brief.

WHEREFORE, the American Dental Association respectfully requests leave to file instanter its attached brief amicus curiae.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia Homeowners,

Petitioners,

vs.

VIRGINIA STATE BAR and FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE AMERICAN DENTAL ASSOCIATION AS AMICUS CURIAE

Statement Of Interest Of The American Dental Association

The writ of certiorari in this case issued upon a petition delineating three issues on the record before this

Court, including the question of the applicability of the antitrust laws to the learned professions. A determination of that issue by this Court will therefore substantially affect not only the activities of the American Dental Association as a nationwide professional association, but also the activities of its dentist members and each state and local dental society which comprise its constituent and component societies.

The American Dental Association respectfully submits this Brief Amicus Curiae in support of affirmance of the court of appeals' determination that the antitrust laws should not be judicially extended to constrain activities of the learned professions.

ARGUMENT

I.

THE UNITED STATES SUPREME COURT HAS NOT EVER EXTENDED THE APPLICATION OF THE ANTITRUST LAWS TO THE LEARNED PROFESSIONS AND ANY DETERMINATION THAT THE ANTITRUST LAWS SHOULD APPLY MUST THEREFORE BE MADE BY CONGRESS

The activities of professional associations have not ever been held by this Court to be within the reach of the antitrust laws. Although this Court has had several opportunities to embrace a definitive application of the antitrust laws to the professions it has chosen not to do so. However, the history of this Court's failure to apply the Sherman Act to the learned professions has created if nothing else a *de facto* determination that the learned professions are exempted from the antitrust laws.

Because other parties to this appeal have fully traced the historical genesis for this learned profession exemption, we shall touch upon it only in passing. However, a brief discussion of the learned profession exemption history is essential to the development of the American Dental Association's position on this appeal.

The history begins with Mr. Justice Holmes' observation in *Federal Baseball Club of Baltimore* v. *National League,* 259 U.S. 200, 209 (1922):

> ". . . a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another state."

Thereafter this Court in *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533, 573 (1944), specifically approved the foregoing language.

Although this Court expanded the scope of the Sherman Act concept of "trade or commerce" to include the rendition of personal services in *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U.S. 427 (1932), and *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485 (1950), both of those decisions quoted with approval Mr. Justice Story's definition of the term "trade" in *The Nymph,* 18 F.Cas. 506, 507 (C.C.D. Me. 1834):

> "Wherever any occupation, employment or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade." (286 U.S. at 436, 339 U.S. at 490-91)

Although this definition was used as a means of expanding Sherman Act Jurisdiction, its use nonetheless conveyed a judicial awareness that learned professions are not within the parameters of those business activities considered trade or commerce for purposes of the Sherman Act. Further, no decision of this Court has extended the rationale of the *Atlantic Cleaners* and *Real Estate* cases that services are trade or commerce to bring the rendition of professional services within the penumbra of the Sherman Act. Instead, in *Real Estate,* this Court declined the opportunity to rule on the applicability of antitrust regulation to professional activities (339 U.S. at 491-92).

In *FTC* v. *Raladam Co.,* 283 U.S. 643 (1931), this Court again provided support for the conclusion that the learned professions were outside the Sherman Act regulatory scheme. In analyzing the record in that case, this Court noted that in order to sustain the Commission's order, it

was necessary to find an injury to competitors. There was no evidence that respondent had any competitors. Certainly, medical practitioners did not compete with respondent, for:

> "Of course, medical practitioners, by some of whom the danger of using remedy without competent advice was exposed, are not in competition with respondent. *They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them.*" (emphasis supplied; 283 U.S. at 653)

In *American Medical Association* v. *United States,* 317 U.S. 519 (1943), this Court rejected a determination by the court of appeals that the restraint of trade prohibition of the Sherman Act could apply to the practice of medicine. Here, this Court granted certiorari to consider three questions, two of which were: 1) Whether the practice of medicine and the rendition of medical services constitute "trade" under §3 of the Sherman Act and 2) Whether there was charge and proof of "restraints of trade" under §3 of the Sherman Act. The decision in the A.M.A. case did not require an answer to the first of these questions, since the medical co-operative whose activities the defendants had restrained was held to be engaged in commerce. Thus, since the alleged restraint acted upon an extra-professional commercial activity, the question of the application of the Sherman Act to the internal regulation of a profession by a professional society went unanswered:

> "Much argument has been addressed to the question of whether a physician's practice of his profession constitutes trade under §3 of the Sherman Act. In the light of what we shall say with respect to the charge laid in the indictment, we need not consider or decide this question." (317 U.S. at 528)

Therefore, though the question of the scope of antitrust constraint on self-regulation of professional organizations persisted, the fact that there remained a question at all, and the fact that this Court did not see fit to dispatch this theory of professional "exemption" add strength to the explicit expression of prior cases that professional activities of the learned professions are not "trade or commerce".

Moreover, in *United States* v. *Oregon State Medical Society,* 343 U.S. 326 (1952), this Court again faced the question of the potential application of the Sherman Act to professional activities and again declined to hold categorically that professional practice and self-regulation by professional associations were "trade or commerce".

While noting that affirmance of the court of appeals required no new interpretation of the statute and presented no material questions of law, this Court nonetheless felt it necessary to comment on the possible inapplicability of the Sherman Act to matters of professional self-regulation:

> "Since no concerted refusal to deal with private health associations has been proved, we need not decide whether it would violate the antitrust laws. *We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters.* This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession. Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 79 L.ed. 1086, 55 S.Ct. 570." (emphasis supplied, 343 U.S. at 336)

Clearly, the above brief history demonstrates that to the extent this Court has dealt with the application of the

antitrust laws to the learned professions, it has registered serious concern with respect to whether the professions should be governed by the antitrust laws if it did not create a de facto exemption.

The status of the learned professions as "exempt" from the reach of the antitrust laws stands on at least the same footing as the decision of this Court in *Flood* v. *Kuhn,* 407 U.S. 258 (1972), which withheld baseball from the reach of the antitrust laws based upon this Court's decisions in *Federal Baseball Club of Baltimore* v. *National League,* 259 U.S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.,* 346 U.S. 356 (1953). Although *Federal Baseball* and *Toolson* are clear holdings that baseball is exempted and the learned profession exemption may be technically dicta in the various decisions of this Court treating with this subject matter, the rationale for not applying the antitrust laws to baseball in *Flood* is even more persuasive on the question of not extending the antitrust laws to the professions in the case at bar.

Despite much criticism of Mr. Justice Holmes' opinion in *Federal Baseball,* this Court in *Flood* analyzed the upholding of the baseball exemption in *Toolson* as follows:

> "(a) Congressional awareness for three decades of the Court's ruling in *Federal Baseball,* coupled with congressional inaction.
>
> (b) The fact that baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing federal antitrust laws.
>
> (c) A reluctance to overrule *Federal Baseball* with consequent retroactive effect.
>
> (d) A professed desire that any needed remedy be provided by legislation rather than by court decree." (407 U.S. 258, 273-74)

The court in *Flood* also noted in passing Mr. Justice Clark's reference to *Federal Baseball* in *Radovich* v. *National Football League,* 352 U.S. 445, 450 (1957), wherein he stated:

> "'. . . combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years.'"

With respect to the foregoing grounds which the *Toolson* Court relied upon for upholding the decision in *Federal Baseball* and which the *Flood* Court looked favorably upon, applied to the instant case, we discern the following: clearly, Congress must be aware of the history in this Court of the "learned profession exemption". Although there has not been the stream of legislation introduced in Congress on the question of the professional exemption as there was for baseball, nevertheless the inaction of Congress in not attempting to provide specific legislation to cover the professions should be at least as persuasive as the congressional inaction for baseball. Indeed, as Mr. Justice Douglas urges in his dissenting opinion in *Flood*, the fact that Congress refused to enact bills broadly exempting professional sports from antitrust regulation might well indicate a legislative intention not to exempt baseball from the antitrust laws (407 U.S. 258, 287-88). There has been no such refusal by Congress in connection with the learned professions.

The interest in applying the antitrust laws to the learned professions has for the most part been a current interest developing within the last three or four years. We need not belabor this Court with citations to secondary source material interpreting this Court's decisions and other federal district and circuit courts of appeals' decisions for the broad proposition of an exemption for the learned professions. See, *e.g., A Supplement to the Report of the Attorney General's Committee to Study the Antitrust Laws, Antitrust Developments,* 215-216 (1968). There can be little doubt that the learned professions, relying on the history of this exemption, considered themselves immune from the reach of the antitrust laws and as a result their development of principles of ethics and education and training of members of their professions have progressed upon the understanding that they were exempt from federal antitrust laws. For this Court in 1975 to render a decision subjecting the learned professions to the antitrust laws with its consequent retroactive effect would cause nothing less than an upheaval in the day-to-day workings of the professions. It necessarily follows that if in the public interest it is determined that the antitrust laws should be applied to the professions this should be done in the legislative branch of our government.

As Judge Moore of the Second Circuit stated with respect to baseball, and which is equally applicable to the professions, in his concurring opinion in the court of appeals decision in *Flood* v. *Kuhn,* 443 F.2d 268, 272:

> "Baseball's welfare and future should not be for politically insulated interpreters of technical antitrust statutes but rather should be for the voters through their elected representatives. If baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November and also face the consequences of his baseball voting record."

Manifestly, the legislative branch of our government is best able to weigh the competing public policy considerations necessary to determine whether the learned professions should be subject to the antitrust laws.

II.

THE IMPACT OF A DECISION THAT THE ANTITRUST LAWS APPLY TO THE PROFESSION OF DENTISTRY WOULD CAUSE A RESTRUCTURING OF THE PROFESSION WHICH IS NOT IN THE BEST INTERESTS OF THE RECIPIENTS OF DENTAL CARE OR THE PROFESSION

Among the primary functions of the American Dental Association are the following: regulating the members of the profession through its Principles of Ethics, assuring the public that the members of the profession and the members of various specialty societies are well educated and trained to perform their profession in accordance with the highest qualitative standards, and approving the use of dental products and materials which conform to standards in the best interest of the recipients of dental care. Necessarily each of these functions carries with it some degree of possible restraint. Indeed, the very efficacy of some of these programs requires some form of enforcement or restraint. To this extent these activities are all subject to possible antitrust attack on various grounds, group boycotts, see, *e.g., Eastern States Retail Lumber Dealers Ass'n* v. *United States,* 234 U.S. 600 (1914); *Fashion Originators' Guild* v. *FTC,* 312 U.S. 457 (1941); standardization of dental products and materials which might make for a uniform price and as such a possible *per se* violation, see, *e.g., C-O-Two Fire Equipment Co.* v. *United States,* 197 F.2d 489, 493 (9th Cir. 1952); *Milk and Ice Cream Can Institute* v. *FTC,* 152 F.2d 478 482 (7th Cir. 1946). Likewise, any attempt by any dental association to work with third party carriers (insurance or otherwise) to offer realistic, worthwhile coverages to provide reasonable assurance that a means toward good oral

health is being made available for dental work may well come in conflict with this Court's admonitions in *United States* v. *Container Corp. of America,* 393 U.S. 333 (1969). Of course, the fact that the American Dental Association would be acting in the best interests of both the profession and the recipients of dental care would not be a defense to any of the above activity which might be held to be a *per se* violation, see *e.g., Fashion Originators' Guild* v. *FTC,* 312 U.S. 457 (1941).

Perhaps the area where a decision in this case applying the antitrust laws to the learned professions would work its most harm would be the enforcement of the Principles of Ethics not only by the American Dental Association but also by each of the state and local societies as well.

In this connection it can be urged that any attempt at self-regulation by an association of professionals which goes beyond mere dissemination of information and which has an arguably restraining effect upon the dental profession would be rendered a restraint of trade potentially violative of the antitrust laws. As noted, in those areas where the restraint could be categorized as parallel to commercial activity that would be a *per se* violation of the antitrust laws, the professional association would be unable to present a defense based upon the public policy necessity of its self-regulatory action. Where an action would be brought on a violation the nature of which would require the application of the rule of reason in a commercial setting, the resolution of the conflict between self-regulation and antitrust restraint of competition would require an analysis of professional activities for which the judicial system is ill-adapted. Though competence in a strictly commercial analysis is imputed to the courts by the continuing application of the rule of reason and *per*

se rules in a strictly business setting there is no indication that the judiciary is equally competent to analyze the reasonableness of professional activities which, while maintaining the quality of professional practice, incidentally restrain the activity of the professional practitioners, or others. Such determinations should be more appropriately made through the expert opinion of those daily engaged in the subject profession, as has been the case since the development of professional associations.

We submit that as to the practice of dentistry, numerous conflicts between the self-regulation of the profession through the American Dental Association Principles of Ethics (the relevant sections of the American Dental Association's Principles of Ethics are printed in full in the attached Appendix) and the constraints of the antitrust laws demonstrate the need for legislative determination of the efficacy of extending the scope of antitrust regulation to include professional activities, if indeed there should be any application of the antitrust laws to the professions. Among these are prohibition of advertising and solicitation of patients (Section 12 *infra* App. 3) and rebates or split fees (Section 9 *infra* App. 3); limitations on and regulation of use of professional titles (Section 15 *infra* App. 4) specialty practice (Section 18 *infra* App. 5), listing of dentists' names in professional directories (Section 19 *infra* App. 5); patents and copyrights on fruits of research (Section 11 *infra* App. 3), use of secret techniques and medications (Section 10 *infra* App. 3); use of auxiliary quasi-professional personnel (Section 6 *infra* App. 2) and rendition of emergency service (Section 5 *infra* App. 2).

Therefore, imposition of antitrust regulation on professional practice would shift the burden of supervision

from the professional associations to the courts. Since, during the history of non-application of the antitrust laws to the professions, professional associations have been allowed and required to develop standards of self-regulation, a decision on the application of the antitrust laws to the professions and the concomitant evisceration of associational self-regulation rests most properly with the Congress or State legislatures (Board of Examiners).

The possibly destructive impact of antitrust constraints on the self-regulation by professional associations was recognized by the court of appeals decision in this case wherein it stated:

> "Any action on this subject matter by a legislative body will clearly be prospective. The ramifications of a judicially initiated extension of the coverage of the Sherman Act is less certain. The potential of the retroactive application of such a judicial extension coupled with the doubt it would cast upon the continuing viability of other ethical restrictions would create confusion in a profession where order is essential." (497 F.2d at 19)

This recognition of the difficulty of applying the antitrust laws to the professions is no different from what this Court observed in *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935), wherein a dentist challenged a state statute regulating advertising by dentists on due process grounds and wherein this Court stated:

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct

from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards." (294 U.S. at 612)

The above analysis should be employed by this Court to affirm the decision of the court of appeals.

CONCLUSION

For years the dental profession, and other learned professions, have been allowed to regulate their profession unmolested by the threat of antitrust enforcement. The numerous improvements and advances in dental technique and dental education make it manifest that the profession of dentistry on public policy grounds need not be subject to the application of the antitrust laws. In an analogous situation, this Court has determined that the intention of Congress in enacting the antitrust laws was not to subject baseball to the proscriptions of the antitrust laws. There are far more persuasive public policy considerations justifying this same conclusion with respect to the learned professions. The reason for seeking leave to file this brief amicus is to make it clear to the Court that the instant decision will have far reaching ramifications on the continued excellence of the dental profession. Accordingly, it is respectfully requested that this Court affirm the court of appeals decision with respect to the "learned profession" exemption, or put another way the non-application of the antitrust laws to the learned professions.

Respectfully submitted,

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January 31, 1975

APPENDIX

APPENDIX

AMERICAN DENTAL ASSOCIATION PRINCIPLES OF ETHICS

Section 1—*Education Beyond the Usual Level*—The right of a dentist to professional status rests in the knowledge, skill, and experience with which he serves his patients and society. Every dentist has the obligation of keeping his knowledge and skill freshened by continuing education through all of his professional life.

Section 2—*Service to the Public*—The dentist's primary duty of serving the public is discharged by giving the highest type of service of which he is capable and by avoiding any conduct which leads to a lowering of esteem of the profession of which he is a member.

In serving the public, a dentist may exercise reasonable discretion in selecting patients for his practice. However, a dentist may not refuse to accept a patient into his practice or deny dental service to a patient solely because of the patient's race, creed, color, or national origin.

Section 3—*Government of a Profession*—Every profession receives from society the right to regulate itself, to determine and judge its own members. Such regulation is achieved largely through the influence of the professional societies, and every dentist has the dual obligation of making himself a part of a professional society and of observing its rules of ethics.

Section 4—*Leadership*—The dentist has the obligation of providing freely of his skills, knowledge, and experience to society in those fields in which his qualifications entitle him to speak with professional competence. The

dentist should be a leader in his community, including all efforts leading to the improvement of the dental health of the public.

Section 5—*Emergency Service*—The dentist has an obligation when consulted in an emergency by the patient of another dentist to attend to the conditions leading to the emergency and to refer the patient to his regular dentist who should be informed of the conditions found and treated.

Section 6—*Use of Auxiliary Personnel*—The dentist has an obligation to protect the health of his patient by not delegating to a person less qualified any service or operation which requires the professional competence of a dentist. The dentist has a further obligation of prescribing and supervising the work of all auxiliary personnel in the interests of rendering the best service to the patient.

Section 7—*Consultation*—The dentist has the obligation of seeking consultation whenever the welfare of the patient will be safeguarded or advanced by having recourse to those who have special skills, knowledge, and experience. A consultant will hold the details of a consultation in confidence and will not undertake treatment without the consent of the attending practitioner.

Section 8.—*Justifiable Criticism and Expert Testimony*—The dentist has an obligation to report to the appropriate agency of his component or constituent dental society instances of gross and continual faulty treatment by another dentist. If there is evidence of faulty treatment, the welfare of the patient demands that corrective treatment be instituted. The dentist may provide expert testimony when that testimony is essential to a just and fair disposition of a judicial or administrative action. A dentist has the obligation to refrain from commenting disparagingly, without justification, about the services of another dentist.

Section 9—*Rebates and Split Fees*—The dentist may not accept or tender "rebates" or "split fees."

Section 10—*Secret Agents and Exclusive Methods*—The dentist has an obligation not to prescribe, dispense, or promote the use of drugs or other agents whose complete formulas are not available to the dental profession. He also has the obligation not to prescribe or dispense, except for limited investigative purposes, any therapeutic agent, the value of which is not supported by scientific evidence. The dentist has the further obligation of not holding out as exclusive, any agent, method, or technique.

Section 11—*Patents and Copyrights*—The dentist has the obligation of making the fruits of his discoveries and labors available to all when they are useful in safeguarding or promoting the health of the public. Patents and copyrights may be secured by a dentist provided that they and the remuneration derived from them are not used to restrict research, practice, or the benefits of the patented or copyrighted material.

Section 12—*Advertising*—Advertising reflects adversely on the dentist who employs it and lowers the public esteem of the dental profession. The dentist has the obligation of advancing his reputation for fidelity, judgment, and skill solely through his professional services to his patients and to society. The use of advertising in any form to solicit patients is inconsistent with this obligation.

Section 13—*Cards, Letterheads, and Announcements*—A dentist may properly utilize professional cards, announcement cards, recall notices to patients of record, and letterheads when the style and text are consistent with the dignity of the profession and with the custom of other dentists in the community.

Announcement cards may be sent when there is a change in location or an alteration in the character of practice, but only to other dentists, to members of other health professions, and to patients of record.

Section 14—*Office Door Lettering and Signs*—A dentist may properly utilize office door lettering and signs provided that their style and the text are consistent with the dignity of the profession and with the custom of other dentists in the community.

Section 15—*Use of Professional Titles and Degrees*—A dentist may use the titles or degrees Doctor, Dentist, D.D.S., or D.M.D., in connection with his name on cards, letterheads, office door signs, and announcements. A dentist who also possesses a medical degree may use this degree in addition to his dental degree in connection with his name on cards, letterheads, office door signs, and announcements. A dentist who has been certified by a national certifying board for one of the specialties approved by the American Dental Association may use the title "Diplomate" in connection with his specialty on his cards, letterheads, and announcements if such usage is consistent with the custom of dentists in the community. A dentist may not use his title or degree in connection with the promotion of any commercial endeavor.

The use of eponyms in connection with drugs, agents, instruments, or appliances is generally to be discouraged.

Section 16—*Health Education of the Public*—A dentist may properly participate in a program of health education of the public involving such media as the press, radio, television, and lecture, provided that such programs are in keeping with the dignity of the profession and the custom of the dental profession of the community.

Section 17—*Contract Practice*—A dentist may enter into an agreement with individuals and organizations to provide dental health care provided that the agreement does not permit or compel practices which are in violation of these ***Principles of Ethics.***

Section 18—*Announcement of Limitation of Practice*—Only a dentist who limits his practice exclusively to the special areas approved by the American Dental Association for limited practice may include a statement of his limitation in announcements, cards, letterheads, and directory listings (consistent with the customs of dentists of the community), provided at the time of the announcement, he has met in each specialty for which he announces the existing educational requirements and standards set by the American Dental Association for members wishing to announce limitation of practice.

In accord with established ethical ruling that dentists should not claim or imply superiority, use of the phrases "Specialist in . . ." "Specialist on . . ." in announcements, cards, letterheads, or directory listings should be discouraged. The use of the phrase "Practice limited to . . ." is preferable.

A dentist who uses his eligibility to announce himself as a specialist to make the public believe that specialty services rendered in his dental office are being rendered by ethically qualified specialists when such is not the case is engaged in unethical conduct. The burden is on the specialist to avoid any inference that general practitioners who are associated with him are ethically qualified to announce themselves as specialists.

Section 19—*Directories*—A dentist may permit the listing of his name in a directory provided that all dentists in similar circumstances have access to a similar listing and provided that such listing is consistent in style and text with the custom of the dentists in the community.

Section 20—*Name of Practice*—The name under which a dentist conducts his practice may be a factor in the selection process of the patient. The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility and status of those practicing thereunder. Accordingly, a dentist shall practice only under his own name, the name of a dentist employing him who practices in the same office, a partnership name composed only of the name of one or more of the dentists practicing in a partnership in the same office or a corporate name composed only of the name of one or more of the dentists practicing as employees of the corporation in the same office.

Use of the name of a dentist no longer actively associated with the practice may be continued for a period not to exceed one year.

The use of dentists' names in directories is covered entirely by Section 19.

Section 21—*Corporate Designations*—Corporate designations may be used.

Section 22—*Judicial Procedure*—Problems involving questions of ethics should be solved at the local level within the broad boundaries established in these *Principles of Ethics* and within the interpretation of the code of ethics of the component society. If a satisfactory decision cannot be reached, the question should be referred, on appeal, to the constituent society and the Council on Judicial Procedures, Constitution and Bylaws of the American Dental Association, as provided in Chapter XI of the *Bylaws* of the American Dental Association.

MOTION FILED

DEC 20 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB,

Petitioners

v.

VIRGINIA STATE BAR and FAIRFAX COUNTY BAR ASSOCIATION,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

ASSOCIATION OF THE BAR OF
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December 20, 1974

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB,

Petitioners

v.

VIRGINIA STATE BAR and FAIRFAX COUNTY BAR ASSOCIATION,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 42 of the Rules of this Court, the Association of the Bar of the City of New York respectfully moves this Court for leave to file the attached brief *amicus curiae* in this case. The consent of attorney for petitioners, Alan B. Morrison, Esq., and of the Office of the Attorney General of Virginia, attorney for respondent Virginia State Bar, has been obtained. However, attorneys for respondent Fairfax County Bar Association, Messrs. Hunton, Williams, Gay & Gibson, have indicated their opposition.

The interest of the Association of the Bar of the City of New York as *amicus curiae* is set forth at pages 1-2 of the attached brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB,

Petitioners

v.

VIRGINIA STATE BAR and FAIRFAX COUNTY BAR ASSOCIATION,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

The Interest of the *Amicus Curiae*

The Association of the Bar of the City of New York is a voluntary bar association having more than 10,000 members. The case before this Court raises issues that intimately concern the Association of the Bar; namely, the preservation of the highest professional standards, on the one hand, and an evenhanded enforcement of the antitrust laws, on the other. We believe that the antitrust laws should be enforced where appropriate against bar associations and against lawyers to the extent that such enforcement does not diminish the full execution of ethical and

professional obligations. On the record in this case, we submit, the prohibitions of the federal antitrust laws should be applied.

The Ruling Below and the Issue Presented (As Limited to the Claim of Attorney Immunity)

In connection with the purchase of a house in Reston, Virginia, located in Fairfax County, Lewis and Ruth Goldfarb were required to have a title search performed by a Virginia attorney. They actively sought the least expensive title-searching services available. However, they were unable to obtain a title search for less than $500, because the Fairfax County Bar Association had adopted a minimum fee schedule providing for such a minimum fee,[1] and Virginia State Bar opinions declared it unethical for attorneys habitually to charge fees below the stated minimum.

The Goldfarbs sued for violation of Section 1 of the Sherman Act. (26 Stat. 209, as amended, 15 U.S.C. §1.) The district court held that the minimum fee schedule in suit had the purpose of fixing a floor for professional fees; that it was a price-fixing agreement; that attorneys are engaged in "trade" within the meaning of the Sherman Act, and that the Fairfax County Bar Association's minimum fee schedule was illegal under Section 1. 355 F. Supp. 491 (E.D. Va. 1973).

The Court of Appeals for the Fourth Circuit reversed. Recognizing that the schedule operated as a "substantial restraint upon competition," it nonetheless held that lawyers fall within a "learned profession" exemption and are therefore immune from Sherman Act violations "where

1 The schedule states the minimum fee in terms of a percentage of the value of the property to be purchased.

the restraint is upon the learned profession itself." 497 F.2d 1, 15 (4th Cir. 1974).

The question to which this brief is addressed is: Are attorneys immune from the price-fixing prohibitions of Section 1 of the Sherman Act?

We answer: Attorneys are not so immune, and they should not be.

Summary of Argument

Attorneys are enjoined to uphold the highest ethical standards. They have duties to the public and to the courts. They are subject to sanctions for violation of the high standards of professional conduct.

The federal antitrust laws prohibit unreasonable restraints on trade or commerce. Among the most egregious of these restraints are agreements that fix, manipulate or stabilize price. In this case, a bar association minimum fee schedule was the instrument for fixing minimum prices. The antitrust laws would clearly invalidate price-fixing by attorneys affecting interstate commerce unless attorneys are immune from these laws.

Immunity from the antitrust laws is not lightly implied. Yet it should clearly be implied if and to the extent that enforcement of the law would frustrate the ability of attorneys to carry out their ethical responsibilities. In this case, immunity should be implied only if the injunction of the antitrust laws against price-fixing and the injunction of the code of ethics to uphold the highest standards of professional conduct are in conflict. They are not at all in conflict. Therefore the antitrust laws should be enforced in this case.

We do not address ourselves to matters beyond the record in this case. We do not consider whether a bar association may fix maximum fees in order to make legal services available to low-income persons. Nor do we consider whether in some cases there may be differences in standards necessary to carry out ethical and professional obligations in rural areas as opposed to urban areas, or by integrated bars as opposed to voluntary bars. These are matters to be dealt with in the context of the facts, as found by the trier of facts in each case.

Argument

The issue presented here is one of the first impression. This Court has never before held that the legal profession or any other "learned" profession is exempt from antitrust proscriptions.[2] It has recognized in dictum that the antitrust laws may sometimes apply differently to the professions to assure that ethical standards are not compromised.[3] It has gone no further.

The statute alleged to have been violated is Section 1 of the Sherman Act. Section 1 of the Sherman Act prohibits all contracts, combinations and conspiracies that unreasonably restrain trade.[4] Some agreements are so pernicious that they violate Section 1 *per se*.[5] Price-fixing is among the most egregious of all such violations. It restrains competition and it deprives the consumer of the benefits of a free and fair price. So abhorrent is price-fixing to a com-

2 The Court of Appeals relied on dicta in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427 (1932); *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931), and *The* [*Schooner*] *Nymph*, 18 F. Cas. 509 (1833).

3 *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 336 (1952) (dictum).

4 *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911).

5 *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958).

petitive economy that it is illegal in itself, and it cannot be justified by good motives.[6]

A strong public policy underlies the Sherman Act. The Act is generally applicable to all classes of persons, and presumptions are made in favor of inclusion, not exclusion.[7] It is argued that the Sherman Act is not applicable to attorneys. If this is so, it may be so for one of two reasons: (1) attorneys may be engaged in a pursuit not in trade or commerce; if so, they are in a class not comprehended by the language of the statute; or (2) attorneys may be impliedly immune from the statutory proscriptions in whole or in part because of a collision of the jurisdictions of antitrust and professional ethics.

We analyze these alternative categories in this brief. As to the first, we find the concept of a "learned profession" exclusion based on the ground that learned professions are not trades both insupportable as a matter of statutory construction and not sufficiently flexible to allow for a proper balancing of competing interests. As to the second, we find concepts of implied immunity useful and workable. The concepts that have emerged in weighing the needs of regulated industries against the objectives of antitrust enforcement provide a framework for assessing the extent of repugnancy, if any, between ethical considerations and antitrust precepts. Finding no repugnancy in this case, we conclude that there should be no immunity.

(1) Are attorneys excluded from the Sherman Act on the ground that learned professions are not trades?

The Court of Appeals would exclude "learned professions" from the purview of the antitrust laws on the ground

6 *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 210 (1940).

7 *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353-55 (1963); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357-61 (1963).

that the "learned professions" are not trades and that therefore a "restraint of trade or commerce" cannot result (497 F.2d at 13). To treat attorneys as thus insulated from trade and commerce is to ignore the realities of the business of being a lawyer. Lawyers render their services for profit and livelihood; and the public can be as equally damaged by excessive, price-fixed legal fees as by price-fixed fees of carpenters or plumbers.

Further, the concept of exclusion, as opposed to implied immunity, fails to confront directly the essential question: To what extent can antitrust and ethical considerations be advanced mutually and compatibly; and to what extent do they collide, requiring antitrust proscriptions to give way?[8]

(2) Are attorneys impliedly immune in whole or in part from the antitrust laws?

In proper cases, immunity from antitrust proscriptions may be implied. However, immunity is highly disfavored; it "is not lightly implied."[9] A potential conflict between a regulatory scheme and the antitrust laws is not sufficient to oust the jurisdiction of either.[10] Rather, as this Court ruled in *Silver* v. *New York Stock Exchange*:

---

8 The question is confronted indirectly by an approach that would recognize an exclusion to the extent of "non-commercial" activities of the profession and that would bring only "commercial" activities within antitrust coverage. This distinction has merit, but may raise unnecessary semantic questions.

A distinction of this nature is suggested in *United States* v. *Oregon State Bar* (D. Ore. Nov. 22, 1974) (not yet published), which rejected a blanket learned-profession exemption and denied defendants' motion for summary judgment in a minimum-fee-schedule price-fixing case.

9 *California* v. *FPC*, 369 U.S. 482, 485 (1962).

10 *Silver* v. *New York Stock Exchange*, note 7 *supra*, 373 U.S. at 357 (1963):

> "Contrary to the conclusions reached by the courts below, the proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted."

> "Repeal [of the antitrust laws] is to be regarded as implied only if necessary to make the [regulatory rules] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." 373 U.S. at 357.

So, too, should repeal of the antitrust laws be limited in reconciling professional standards with antitrust objectives. Immunity should be granted only where necessary to accommodate ethical considerations. Indeed, where immunity is claimed on the ground of ethics, it is incumbent upon the courts to go beyond mere semantics to determine whether a real ethical standard is involved.

The need for such an inquiry emerges clearly here. The Virginia State Bar has labeled "unethical" the practice of charging lower than minimum fees. To the contrary, restraints against individual fee-determination would seem unethical, or, at the least, unprofessional. Because a bar association calls "unethical" a practice that may promote competition does not mean that it is necessarily so.

To be sure, the law should be, and it is, flexible enough to provide "breathing space" for professional standards where breathing space is truly needed.

In the *Stock Exchange* case, this Court said:

> "[U]nder the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the [conflicting scheme]." 373 U. S. at 360.

Attorneys, likewise, must be free to carry out fully their professional responsibilities. There may be occasions when the antitrust laws must be relaxed to accommodate

professional standards; but this is not such a case. On the facts in suit there is no incompatibility between antitrust and ethics. Attorneys in communities without minimum fee schedules can be fully as ethical and professional as attorneys in communities that have them.[12]

Price-fixing itself is unprofessional conduct. The New York Court of Appeals said in dictum in *Lincoln Rochester Trust Co.* v. *Freeman:*

> ". . . [C]oncerted conduct to produce as a primary purpose a certain minimum financial reward would be unprofessional . . . ." 34 N. Y. 2d at 11.[13]

The trial court herein said:

> "The Court has some question whether the adoption of a minimum fee schedule is itself 'professional'. . . . Certainly fee setting is the least 'learned' part of the profession." 355 F. Supp. 491, 495.

Given the unprofessional character of price-fixing, there would seem little more to debate. Yet it is argued that

12 See *Lincoln Rochester Trust Co.* v. *Freeman,* 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 (1974), wherein the New York Court of Appeals, while stating that attorneys were not intended to be included within the New York State antitrust law, said:

> "It is interesting that neither respondent nor *amicus curiae* have, in their submissions, established need for the minimum fee schedule, or that similar needs have existed generally, or to explain why in other parts of the State the use of minimum fee schedules does not seem to be correlated with population, urbanization, or other social factors which might explain either the use or nonuse of minimum fee schedules. Quite unpersuasive would be the argument that fee schedules are an indirect way of discouraging solicitation. If fee schedules are otherwise objectionable then the methods are too indirect and too strong for an ill that is otherwise curable. . . ." 34 N.Y.2d at 11-12.

13 The court in *Lincoln Rochester Trust* said also:

> ". . . [Bar association minimum fee schedules] may violate professional standards if their purpose or effect would be to control the fee level for professional services, or would have the purpose or effect of preventing 'fee competition' in the rendering of legal services." 34 N.Y.2d at 6.

attorneys are different from tradespeople; they are professionals; they are held to the highest standards; they are subject to sanctions if they do not meet their professional obligations.

These observations seem to us to provide no reason why offending attorneys should be immune from antitrust penalties. They would seem to provide no reason why the public, if forced to pay inflated legal fees, should be deprived of the usual remedies against the offenders while contractors, plumbers and bricklayers who violate the same proscriptions are subject to the law. Merely because lawyers are enjoined by professional standards to refrain from doing a forbidden thing is not a reason why they should be free from the antitrust consequences of having done it. To the contrary, if persons not subject to codes of ethics are bound by the laws against price-fixing, then *a fortiori* a professional, whose conduct should be exemplary, should be bound. An exception for attorneys can only diminish the confidence of the public in the integrity of the legal profession. Lawyers are not, and they should not be, above the law.

Conclusion

It is respectfully submitted that, on the facts of this case, there is no attorney-exemption from the price-fixing prohibitions of the Sherman Act.

Respectfully submitted,

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1974

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR.

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,

Petitioners,

v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FOR RECONSIDERATION OF MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Association of the Bar of
the City of New York
Eleanor M. Fox, Counsel
One Battery Park Plaza
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212-483-9000

February 3, 1975

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,

Petitioners,

v.

VIRGINIA STATE BAR AND
FAIRFAX COUNTY BAR ASSOCIATION,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE ASSOCIATION OF THE
BAR OF THE CITY OF NEW YORK FOR
RECONSIDERATION OF MOTION FOR
LEAVE TO FILE A BRIEF AMICUS CURIAE

The Association of the Bar of the City of New York ("City Bar") respectfully moves this Court, in light of new developments, for reconsideration of its Motion for Leave to File its Brief Amicus Curiae in the above-captioned case. Unless, on reconsideration, this Court accepts the brief of the City Bar, as well as a brief by the District of Columbia Bar similarly urging Petitioners' position, the Court will have before it the amicus briefs offered by those bar groups that would immunize lawyers from the laws against price-fixing while excluding the briefs of the bar groups that find no justification for this special exemption.

This anomolous situation came about because Respondent Fairfax County Bar Association refused to consent to the filing of amicus briefs by the bar associations that oppose its claim of antitrust immunity, whereas Petitioners granted such permission even to those that urge immunity. Thus, the bar groups favoring Respondents were able to get the consent of all parties and were entitled to file their briefs without order of the Court pursuant to Rule 42 of the Rules of the Court.

The City Bar moved for leave to file its brief Amicus Curiae in favor of Petitioners, with its brief attached to the motion, on December 20, 1974. The District of Columbia Bar so moved on December 27, 1974. On January 13, 1975, the Court denied both motions, without stating its reasons therefor. On or about January 31, 1975, five bar groups filed briefs Amicus Curiae in favor of or tending to favor Respondents. On a matter of such importance to the even-handed administration of justice directly involving the propriety of functions of the organized bar, we respectfully submit that the Court should have before it all views, and not just one part of the spectrum of views, of the bar.

We urge this Court to consider its prior action in light of the above events, and on reconsideration to grant the motion of the City Bar for leave to file its brief Amicus Curiae.

Respectfully submitted,

Eleanor M. Fox

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the City of New York
Eleanor M. Fox, Counsel
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I certify that the above motion is filed in good faith and not for delay.

Eleanor M. Fox

Eleanor M. Fox

DEC 27 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
Petitioners

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VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE DISTRICT OF COLUMBIA BAR AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION OF THE DISTRICT OF COLUMBIA BAR FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the District of Columbia Bar hereby respectfully moves this Court for leave to file the attached brief *amicus curiae* in the above-captioned case. The brief supports the position of the petitioners that there is no "learned profession" exemption to the Sherman Act rendering the Act inapplicable to fee schedules promulgated by attorneys or groups of attorneys.

The attorney for petitioners, Alan B. Morrison, Esq., and the Office of the Attorney General of Virginia, attorney for respondent Virginia State Bar, have consented to the filing of a brief by the District of Columbia Bar. The attorneys for respondent Fairfax County Bar Association, Hunton, Williams, Gay and Gibson, Esqs., have objected to the filing of a brief *amicus curiae* by the District of Columbia Bar.[1]

The interest of the District of Columbia Bar as *amicus curiae* is set forth at pages 1, 2 and 3 of the attached brief. This case presents significant questions relating to the legal profession throughout the United States arising in the context of a private law suit. We believe that this Court should have the benefit of the views of the organized bar on a matter which may greatly affect the delivery of legal services and public confidence both in the legal profession and the administration of justice. We wish to bring to this Court's attention the experience and views of members of a

[1] The letters from counsel have been supplied to the Clerk of this Court together with this motion and brief.

unified bar association located in an important jurisdiction, the District of Columbia.[2]

Respectfully submitted,

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D.C. Bar

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December 1974

[2] In a recent case, *Angarano* v. *United States,* No. 7006, decided December 2, 1974, the District of Columbia Court of Appeals held that it was unnecessary to resolve what it termed "the constitutional problems presented by the submission of an amicus brief purportedly expressing the position of the total membership of a compulsory bar. . . ." (p. 1354) It accepted an *amicus* brief of the D. C. Bar in that case as one filed on behalf of the Board of Governors of the unified bar. (*Id.*)

Since the *Angarano* decision, the Board of Governors has adopted comprehensive procedures for notifying the membership of the bar of a proposed *amicus* brief and for taking account of dissenting views. These procedures, which we believe to be the first of this character adopted by any bar in the United States, are in full conformity with the Court's decisions in *Lathrop* v. *Donohue,* 367 U.S. 820 (1961); *International Ass'n of Machinists* v. *Street,* 367 U.S. 740 (1961); and *Brotherhood of Railway & S.S. Clerks* v. *Allen,* 373 U.S. 113 (1963).

Because of the time necessary to comply with these procedures with respect to the present brief, it was not possible to file it by December 20, 1974, the filing date of petitioners' brief. Copies of a draft of the brief, however, were sent to the parties on December 19, 1974, and no changes of substance have been made in the brief as filed herewith. Accordingly, respondents have not been in any way prejudiced.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE DISTRICT OF COLUMBIA BAR AS AMICUS CURIAE

THE INTEREST OF AMICUS CURIAE AND THE ISSUE DISCUSSED HEREIN

The District of Columbia Bar is the unified bar association of all lawyers admitted to practice law in the District of Columbia. It was established in 1972 pursuant to Rules of the District of Columbia Court of Appeals, acting under the authority of the District of

Columbia Court Reform and Criminal Procedure Act of 1970, P. L. 91-358, 11 D.C. Code § 2501 (Supp. IV, 1971). The purposes of the D.C. Bar are "to aid the court in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence in public service, and high standards of conduct; to safeguard the proper professional interest of the members of the Bar; . . . to the end that the public responsibility of the legal profession may be more effectively discharged." (Rule I, Section 2).

The officers and Board of Governors of the Bar are elected by written ballot by the full membership. The District of Columbia Bar has over 18,000 members and is the fourth largest bar association in the country.

The District of Columbia Bar believes that the decision of the Fourth Circuit is erroneous in holding that the practice of law, as a "learned profession," is exempt from the coverage of the Sherman Act, 26 Stat. 209, as amended; 15 U.S.C. § 1.[1] *Amicus* submits that commercial restraints on competition by lawyers, such as price fixing (including the promulgation of fee schedules), violate the Sherman Act. A definitive determination by this Court of this issue is of exceptional importance to the public and to the legal profession. The holding below that "learned professions" are engaged neither in trade nor commerce is so at odds with reality as to diminish public confidence in the law and the legal profession. That confidence is critical to the proper functioning of our system of law. The profession does not require any general exemption from the antitrust laws to regulate the ethical conduct of lawyers. The holding below also opens the door to immunization of restrictive practices in other "learned professions" which run directly contrary to the policy of the antitrust laws and the interests of the public.

[1] This brief does not discuss and *amicus curiae* takes no position with respect to the "state action" and commerce issues also before this Court or with respect to whether a ruling by this Court that the Sherman Act is applicable on the facts herein should be given prospective effect only or retroactive effect.

ARGUMENT

I. There Is No "Learned Profession" Exemption Immunizing Lawyers from the Proscription of the Sherman Act

Price fixing has long been condemned as the most serious restraint upon trade and commerce and one in which the character of the offense removes it from the operation of the rule of reason. Although some forms of restraint upon trade may be subject to analysis by courts, under the rule of reason, price fixing has long been held to be a *per se* violation of Section 1 of the Sherman Act. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Northern Pacific Railway Company* v. *United States*, 356 U.S. 1 at 5 (1958).

Price fixing of legal services works a particular harm to the public because of the continuing necessity for these services on a regular basis and because no alternative sources exist.

The importance of price competition in the sale of legal services is underscored by two factors which distinguish them from other types of services rendered to the public: (1) virtually all members of the public require some legal services at some time, and (2) unlike some consumer service requirements, legal services

are non-deferrable. A buyer concerned that price fixing has resulted in an over-valued price may defer purchase of a household appliance or a lawn care service; but one needing shelter must obtain an assurance of a valid title before closing purchase of a house; an estate must be probated in order to distribute the assets; litigation cannot be delayed until the cost of legal services is reduced.

It is noteworthy that the non-deferrable services for which there is the most widespread continuing need are those provided by the so-called "learned professions." Medical, dental and legal services, more than any others, must be utilized when needed irrespective of price. Thus, there is a compelling social necessity to carry out the purpose of the Sherman Act by providing these services in an atmosphere free of price restraint.

It is ironic that minimum fee schedules were promulgated in the past as part of ethical codes to guide the conduct of attorneys, since it is the public interest which the ethical codes are designed to protect. Ethical codes were not supposed to benefit attorneys at the public's expense. Yet fee schedules, as in the case at bar, may be based on factors unrelated to the complexity of the legal issue, the skill or experience of the attorney, or the time devoted to the matter.[2] The consumer of legal services, a proper and intended beneficiary of ethical codes, thus is victimized by fee fixing in precisely the way which the Sherman Act sought to eliminate.

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[2] Each of the twenty attorneys responding to petitioners' inquiry indicated that, in accordance with the minimum fee schedule of respondent Fairfax County Bar Association, the fee for a title search would depend solely on the value of the property being purchased.

The Fourth Circuit's holding that fee fixing by lawyers does not violate the Sherman Act because "learned professions" do not constitute trade or commerce requires reversal. It adversely affects public confidence in the law and the legal profession and is incorrect as a matter of law. Public confidence in legal instiutions will be shaken if the highest court of the land rules that lawyers and a handful of other "learned professionals" are exempt from laws of general applicability, particularly where the legislation by its terms contains no such exemption. Exemption of the legal profession would inevitably be perceived as self-serving and inconsistent with the reality confronted by the average citizen seeking legal services. To the public, consulting a lawyer is a commercial transaction, notwithstanding any desire to obtain advice of a professional nature. In transacting business with lawyers, the public is entitled to the protection of the Sherman Act.

The Sherman Act's design and importance to our free enterprise system has been described aptly by Chief Justice Hughes in *Appalachian Coals* v. *United States,* 288 U.S. 344, 359-60 (1933):

> "The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."

and by Mr. Justice Black in *Northern Pacific Railway Company* v. *United States, supra,* 356 U.S. at 5:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at

> preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

These principles are as true today as when written.

This Court has never, as a matter of law, immunized from the Act's coverage conduct engaged in by members of a so-called 'learned profession."[3] There is no basis in the language of the Sherman Act to support the subtraction of such a vast segment of our economy from that fundamental charter of our economic system.

The Fourth Circuit Court's observation (497 F.2d at 13) of the existence of an historical development of a "learned profession" exemption from the scope of the antitrust laws was proffered without citation of authority or precedent. It did, however, cite two Supreme Court cases[4] for its conclusion that such an

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[3] In *American Medical Ass'n* v. *United States*, 317 U.S. 519, 528 (1943) and *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 491-92 (1950), the Court expressly reserved consideration of the issue.

[4] *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 653 (1931); *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922). In the interest of avoiding duplication, the analysis of these cases by the Court below and their impact on the issue at bar will not be treated here, since the subject will be amply briefed by others. Suffice it to say that *amicus* is of the opinion that those cases do not support any exemption from the antitrust laws for lawyers.

exemption from the Sherman Act exists. The reasoning of the Court below is difficult to understand, since it conceded that this Court subsequent to *Raladam* and *Federal Baseball* had expressly deferred a decision on the issue, *American Medical Ass'n* v. *United States, supra; United States* v. *National Ass'n of Real Estate Bds., supra.* Yet the Fourth Circuit rested its conclusion on those earlier cases.

This Court has emphasized the importance of applying the Sherman Act's commands to the provision of services by professions:

> "The [Sherman] Act was aimed at combinations organized and directed to control of the market by suppression of competition 'in the marketing of goods and services'." *United States* v. *National Ass'n of Real Estate Bds., supra,* 339 U.S. at 490.

Numerous cases have held professional activities subject to the Sherman Act.[5] Noting the commercial aspects of one "profession," this Court observed:

> "We have said enough to indicate we would be contracting the scope of the concept of 'trade,' as

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[5] See *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950) (real estate brokerage fees); *Associated Press* v. *United States*, 326 U.S. 1 (1945) (news services); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (insurance underwriting); *American Medical Ass'n* v. *United States*, 317 U.S. 519 (1943) (medical and hospital services); *Levin* v. *Joint Comm'n on Accreditation*, 354 F.2d 515 (D.C. Cir. 1965) (hospital accreditation); *Northern California Pharmaceutical Ass'n* v. *United States*, 306 F.2d 379 (9th Cir. 1962) *cert. denied*, 371 U.S. 862 (pharmacy); *United States* v. *American Pharmaceutical Ass'n*, 344 F. Supp. 9 (E.D. Mich. 1971) (pharmacy); *Friends of Animals* v. *American Veterinary Medical Ass'n*, 301 F. Supp. 1016 (S.D.N.Y. 1970) (veterinary medicine), *United States* v. *Utah Pharmaceutical Ass'n*, 201 F. Supp. 29 (D. Utah 1962), *aff'd*, 371 U.S. 24 (pharmacy).

used in the phrase 'restraint of trade,' in a precedent-breaking manner if we carved out an exemption for real estate brokers. Their activity is commercial and carried on for profit." *United States* v. *National Ass'n of Real Estate Bds., supra,* 339 U.S. at 492.

The legal profession, the medical profession, indeed all professions, are also engaged in commercial activity for a profit. As this Court recently noted:

> "We live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of free enterprise." *Fuller* v. *Oregon,* 417 U.S. 40, 53 (1974).

Many "professions" require some degree of learning or a skill level above that possessed by the average member of the community. Special tests are frequently required before governmental jurisdictions will permit citizens to hold themselves out as competent to practice in a particular profession. The District of Columbia, for example, requires examinations prior to license of beauticians, 2 D.C. Code, §§ 1301 *et seq.;* barbers,. 2 D.C. Code §§ 1103 *et seq.;* and real estate brokers, 45 D.C. Code, §§ 1401 et seq. It would be incongruous to contend, however, that persons engaged in these trades or aspects of commerce are exempt from the proscriptions of the Sherman Act because of the special skill required to perform these activities.

A higher degree of learning and intellectual attainment required of those who practice law may be a source of pride to the profession, but it hardly serves to render that profession devoid of commercial

aspects.[6] In fact, the vast majority of attorneys engaged in the practice of law do so as a means of earning their livelihood. At the least, those in private practice are engaged in a "trade or commerce."

II. A "Learned Profession" Exemption From the Antitrust Laws Is Not Necessary for the Maintenance of High Ethical Standards in the Legal Profession

The maintenance of high ethical standards by lawyers is a principal concern of the organized bar. In some jurisdictions bar associations have been officially delegated responsibility for discipline of lawyers; in others they participate informally.

Amicus considers a blanket exemption of the legal profession from the antitrust laws as to internal matters of the profession unnecessary to the maintenance of high ethical standards in the profession. *Amicus* has no fee schedules and has a role to play in assuring ethical standards. No impediment to the maintenance of high ethical standards resulting from the absence of any fee schedule has been perceived.

A "learned profession" exemption ignores the impact of a restrictive activity on the public. It prevents the courts from considering whether a particular restraint is reasonable in light of the underlying ethical considerations to which that restraint is addressed. The Court below thus adopted a *per se* exclusion, rather than the traditional approach in antitrust law which examines each restrictive practice to

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[6] The District Court in Oregon recently held the fee schedule of the Oregon State Bar subject to the Sherman Act. *United States* v. *Oregon State Bar,* Civ. No. 74-362, (D. Ore. 1974). The Court, in an opinion dated November 22, 1974 (as yet unpublished), after examining the arguments with respect to the so-called "learned profession" exemption, concluded that fee schedules are clearly commercial and rejected any immunity for the legal profession.

determine whether the restraint is unreasonable. *Standard Oil Co.* v. *United States,* 221 U.S. 1, (1911)

The threshold question is whether the restriction at issue is commercial. If it is not commercial, the Sh[illegible]an Act may not come into play at all. *Apex Hosiery* v. *Leader,* 310 U.S. 469 (1940). If it is commercial, the conduct must then be examined to ascertain whether it is *per se* unreasonable, *Northern Pacific Railway Company* v. *United States, supra.* If it is not a *per se* violation, the Court must determine whether it is unreasonable in light of the nature of the trade or commerce involved, *Standard Oil Co.* v. *United States, supra, cf. White Motor Company* v. *United States,* 372 U.S. 253 (1963), or reasonable in light of all the facts concerning the market affected, *Chicago Bd. of Trade* v. *United States,* 246 U.S. 231 (1918). The case at bar presents a purely commercial restriction and a *per se* offense, the fixing of fees. We know of no other restraints on attorney conduct imposed by ethical codes or bar associations which will have as direct a commercial impact without relationship to ethical conduct by attorneys.

Amicus submits that the above-described process is the proper approach under the antitrust laws, whether for "learned professions" or others. A similar approach was set forth by the Court of Appeals for the District of Columbia in *Marjorie Webster Junior College* v. *Middle States Ass'n of Colleges and Secondary Schools,* 432 F.2d 650 (D.C. Cir. 1970), *cert. den.,* 400 U.S. 965 (1970). That Court had already rejected the "learned profession" exemption.[7] In

[7] See *United States* v. *American Medical Ass'n,* 110 F.2d 703 (D.C. Cir. 1940), *cert. den.,* 310 U.S. 644 (1940); *American Medical Ass'n* v. *United States,* 130 F.2d 233 (D.C. Cir. 1942), *aff'd on other grounds,* 317 U.S. 519 (1943).

Marjorie Webster Junior College, an antitrust challenge was raised against the educational accreditation process by a school denied accreditation. The Court made no attempt to exclude non-profit educational institutions from the antitrust laws. Rather it examined the particular *conduct* challenged in light of the nature of the activity of the institution involved and the policy of the antitrust law.

In making such a review of standards of conduct the courts are entitled to give appropriate weight to the judgments of the profession as to the necessity or justification for a particular restriction.

> "The extent of judicial power to regulate the standards set by private professional associations, however, must be related to the necessity for intervention. Particularly when, as here, judicial action is predicated not upon a legislative text but upon the developing doctrines of the common law, general propositions must not be allowed to obscure the specific relevant facts of each individual case. In particular, the extent to which deference is due to the professional judgment of the association will vary both with the subject matter at issue and with the degree of harm resulting from the Association's action." [Footnotes omitted.]

Marjorie Webster Junior College v. *Middle States Ass'n of Colleges and Secondary Schools, supra,* 432 F.2d at 655-56; *cf. United States* v. *Oregon Medical Society,* 343 U.S. 326 (1952).

This approach judges conduct in light of the legitimate needs of the profession and the public and offers the proper framework for review of restrictive practices in a time when important structural changes are occurring in the learned professions.

> "Profound changes in social and economic conditions have forced members of all professional

groups to make readjustments. The fact that these changes may result even in depriving professional people of opportunities formerly open to them does not justify or excuse their use of criminal methods to prevent changes or to destroy new institutions. Lawyers, too, have seen, during recent decades, large scale changes in their professional work. There was a time when lawyers worked entirely on fee or retainer in particular cases and controversies; now many of them are salaried employees on the staffs of large corporate industrial and financial organizations. Many of the simpler functions of business which once required the assistance of lawyers are now the routine work of better educated and more highly skilled business men; some of them law school graduates. Recent legislation has had the effect of removing from the field of judicial controversy and determination, a large percentage of cases which at an earlier time constituted the mainstay of lawyers' practice." [Footnotes omitted.]

American Medical Ass'n v. *United States, supra,* 130 F.2d at 245. These words, written thirty years ago, are even more descriptive of the situation today.

The complexity of the issues raised by the application of the antitrust laws to the "learned professions" and the undesirability of a *per se* exclusion become apparent when one considers the variety of practices which may be utilized by the various professions. Physicians, optometrists, dentists, accountants, engineers, architects, psychologists, pharmacists, to name only some, may all claim a similar exemption. The Justice Department has only recently filed suits against organizations of accountants, engineers and architects involving restraints on competition among members of the profession. See 60 ABA Journal 1410, 1411 (Nov.

1974). Consulting organizations or multi-disciplinary groups of "learned professionals" also may seek to claim the exemption. The substantial impact of professional activities on the national economy dictates against the granting of widespread or blanket exemptions to the antitrust laws.

CONCLUSION

A "learned profession" exemption removing lawyers from the strictures of the antitrust laws is inconsistent with the purposes of those laws and contrary to the realities associated with the practice of law. Price fixing by lawyers violates the Sherman Act. Accordingly, the Fourth Circuit ruling setting forth a "learned profession" exemption for lawyers should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
Petitioners

v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE DISTRICT OF COLUMBIA BAR FOR RECONSIDERATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE DISTRICT OF COLUMBIA BAR FOR RECONSIDERATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The District of Columbia Bar respectfully moves this Court for Reconsideration of its Motion for Leave to File Brief Amicus Curiae in the above-captioned case. The District of Columbia Bar moved on December 27, 1974, for leave to file a brief Amicus Curiae. The brief, which supported petitioners and urged that there was no

"learned profession" exemption from the Sherman Act for lawyers, was attached to the motion. On January 13, 1975, this Court denied the motion, as well as a motion of the Association of the Bar of the City of New York which similarly supported the petitioners' position. While the Court did not state any reason for its denial of the District of Columbia Bar's motion, respondent, Fairfax County Bar Association, had opposed the filing of the brief by letter dated December 11, 1974. No reason was given by Fairfax for its opposition. Since then various bar groups have filed amicus briefs with unanimous consent. These briefs, while not uniform, all take positions generally opposing petitioners and supporting respondents. It is clear that the organized bar professes substantially diverse positions on the issues raised in this case.

It is unlikely that this Court was aware of the amicus briefs that were to be filed when it acted on the District of Columbia Bar's motion. The briefs were filed without an order of the Court, pursuant to Rule 42 of the Rules of this Court, because the consent to their filing was unanimous. Unlike its opposition to the District of Columbia Bar brief, Fairfax gave its consent in these instances, presumably because the positions taken in the briefs were favorable to it. Petitioners consented even though the briefs opposed their position in this case.

The issues in the instant case are of great importance to the organized bar and to the equal administration of justice. We submit this Court should have the benefit of the differing views of

various segments of the organized bar on such an important subject and not have its access to such views subject to the whims of any one litigant appearing before it.

We urge this Court to reconsider its previous action and grant the District of Columbia Bar leave to file its brief as Amicus Curiae.

Respectfully submitted,

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February 4, 1975

I certify that the above Motion is presented in good faith and not for delay.

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MAR 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia Homeowners,

Petitioners,

v.

VIRGINIA STATE BAR and FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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IN THE

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OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB,
individually and as Representatives of the Class
of Reston, Virginia Homeowners,
Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,
Respondents.

**ON A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

REPLY BRIEF FOR PETITIONERS

This reply brief is submitted in response to the briefs submitted by the two respondents as well as the six briefs *amicus* submitted in support of their position. In addition to supplementing the arguments made in petitioners' principal brief ("Pet. Br."), this reply will address the issues of the effect of the Eleventh Amendment, raised by respondent Virginia State Bar, and of prospectivity, raised by respondent Fairfax County Bar Association, neither

of which were addressed in our original brief. It remains the view of petitioners that neither of these issues should now be considered by this Court but should be resolved in the first instance by the court of appeals which, because of its other rulings, did not pass on these questions. See *United States v. ITT Continental Baking Co.*, ____ U.S. ____, 43 U.S.L.W. 4266, 4267 n. 2 (decided February 19, 1975).

I. RESPONDENTS' MINIMUM FEE SCHEDULE SYSTEM CONSTITUTES A PER SE VIOLATION OF THE SHERMAN ACT.

A. The Activities of Respondents Plainly Constitute Price-Fixing.

Respondent Fairfax has contended (Br. 47-52) that the minimum fee schedule system involved here does not constitute price-fixing because the schedule was "merely advisory." (Br. 50, 52) That view, of course, conveniently overlooks (a) that under Opinions issued by the State Bar, an attorney who habitually charged below the minimum schedule could be disciplined for that reason alone (A. 45-48),[1] (b) that the record demonstrated numerous instances of attorneys who believed that they were ethically required to, and in fact did adhere to, the minimum fee schedule (Pet. Br. 4-5), and (c) that the district court found as a fact that the Goldfarbs had been injured by the operation of the minimum fee schedule system (App. A, p. 4). It is simply not open to respondents to argue in this Court that the facts found by the district court are unsupported by the record.

[1] References preceded by "A" are to the single printed appendix. References to the appendices accompanying the petition will designate the particular appendix and the page in it, (App. ___ p. ___).

Moreover, the law is clear that there need not be actual adherence in order for there to be price-fixing in violation of the Sherman Act. *Plymouth Dealers Ass'n of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960). Furthermore, as this Court observed in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940), it is irrelevant "that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible . . ."; price-fixing exists if there is a combination "with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce . . . ." *Id.* at 223. Thus, any combination "which tampers with price structure" is a *per se* violation of the Sherman Act. *Id.* at 221.

This Court has recently declared that any activity which "tends toward price uniformity" constitutes a *per se* violation of the Sherman Act. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969). "Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition." *Id.* at 338. Similarly, in *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950), the use of a minimum fee schedule similar to the one at issue here was held to constitute a *per se* violation even though there was no possibility of disciplinary proceedings against those who did not adhere to it. Based on these authorities, we submit that there is no question that respondents' activities constituted price-fixing in violation of the Sherman Act.

B. The Obligation of the Bar to Protect the Public through Self-Regulation Does Not Permit the Bar to Avoid the Effect of *Per Se* Rules Under the Sherman Act.

Contrary to the assertion of respondent Fairfax (Br. 26-32), the "weight of judicial authority" does not support a learned profession exemption (See Pet. Br. 34-43). Moreover, it is not correct, as the brief of the *amicus* American Bar Association (ABA) asserts, that "all antitrust decisions in any way concerned with the professions have carefully considered the particular characteristics of the profession involved" (ABA Br. 3), nor is it correct that the relevant decisions contain "ample support for the proposition that an exclusion, or some other mechanism, *must exist* to harmonize necessary professional regulation with antitrust principles developed in the context of ordinary trade or commerce." (ABA Br. 7, emphasis added). In fact, this Court in *American Medical Ass'n v. United States*, 317 U.S. 519, 528 (1943) ("*AMA*"), held that the occupations of the defendants were "immaterial if the purpose and effect of their conspiracy was [the] obstruction and restraint of the business of Group Health." In ruling that defendants in *AMA* violated the Sherman Act, this Court evidenced not the slightest concern that the anticompetitive conduct was rooted in medical ethics. Just as the activities in *AMA* were purportedly based upon ethical considerations,[2] the claim of ethics is raised here as a defense to the price-fixing charge and should be rejected by this Court under the authority of *AMA*.

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[2] See *United States v. American Medical Ass'n*, 110 F.2d 703, 706, 711-712 (D.C. Cir. 1940).

Petitioners share the concern of the *amicus* ABA for the welfare of the members of the public who are the consumers of legal services, but firmly believe that their interest as consumers will be advanced by applying the antitrust laws to minimum fee schedules. In our view there is no basis for concluding that minimum fee schedules are intended to, or have the effect of aiding the public in dealing with the Bar.[3] Indeed, the plainly economic origins of minimum fee schedules in Virginia (Pet. Br. 7-8 and n. 5; 42-43 and n. 32) are convincing evidence that, like price-fixing in other fields, the restraints operate here for the principal benefit of the lawyers who use them. The point is further emphasized by the State Bar of Texas' quotation of EC 2-16 of the Code of Professional Responsibility in the conclusion to its *amicus* brief supporting the decision below:

> The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. (Br. 29).

While many other ethical restrictions to which lawyers are subject do in fact serve as significant protections for the public, minimum fee schedules plainly do not, and this Court need not be concerned that the elimination of fee schedules will have any adverse impact on the consumers of legal services.

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[3] In evaluating the claim that fee schedules protect the public, we note that as to the services involved in this case (title examinations in Virginia) lenders do not rely on the lawyer's opinion as to the state of the title but require title insurance in virtually every case (App. A, p. 4). Therefore, contrary to the assertion of the Fairfax Bar (Br. 34), the true source of the public's protection is the title company, not the lawyer.

The apparent fear of the ABA is that ethical considerations unrelated to minimum fee schedules may be destroyed by too expansive a sweep of the antitrust laws which would undermine the principle of self regulation and thereby cause serious harm to the public. Petitioners too are concerned about the problem of delivering quality legal services and with insuring that clients receive ethical treatment from the members of the Bar. However, we believe that the proposal of the ABA for reconciling self-regulation and the antitrust laws (Br. 13) is no solution to the problem. Under that proposal, any conduct "in furtherance of legitimate objectives of professional regulation" would be exempt from antitrust scrutiny. Quite apart from the fact that neither in *AMA* or any other decision has this Court upheld an antitrust exemption based on the legitimacy of the objectives of the activities,[4] the "in furtherance of" language and the phrase "legitimate objectives of professional regulation" are so broad that they appear to exclude every significant restraint from the reach of the Sherman Act. This conclusion is buttressed by the fact that the ABA takes no position with respect to whether minimum fee schedules violate the Sherman Act under its own test, and its brief does not even urge this Court to decide this case in a particular way although all the evidence supporting fee schedules is in the record. The fact that the ABA's "solution" produces no resolution of legality even with respect to the most pernicious of antitrust violations — price-fixing through minimum fee schedules — strongly suggests that it is not a test or a resolution, but a total exemption from the antitrust laws.

[4] *In United States v. Topco Associates Inc.*, 405 U.S. 596, 610 (1972) this Court specifically rejected an argument that "naked restraints of trade are to be tolerated because they are well-intended . . . ."

Fairfax and the ABA nonetheless contend that to apply the *per se* rule even in this situation would destroy the principle of self-regulation, a principle which has never been upheld in an antitrust context, as evidenced by the decision in *AMA*. For this proposition Fairfax relies on *Silver v. New York Stock Exchange*, 373 U.S. 341, 348-349 (1963), where this Court indicated that antitrust laws may be modified where the conduct is supported by a "justification derived from the policy of another statute or otherwise." There is, of course, no statute which specifically authorizes the practices at issue here, and there is no case of this or any other court upholding an exemption based on the "or otherwise" language.

Another aspect of the *Silver* exemption is that incursions into the antitrust laws are permitted ". . . only if necessary to make the Securities Exchange Act work and even then only to the minimum extent necessary." *Id.* at 357. To this end, Fairfax argues that the fee schedules and the State Bar Reports are "essential components of Virginia's policy of ethical regulation of the legal profession" (Br. 5), that they are aspects of "the necessities of professional self-regulation" (Br. 26), and that the fee schedules can be justified by their "importance . . . to the profession's self-regulation" (Br. 28-29). But its own action on September 16, 1974, in permanently rescinding its own fee schedule wholly undermines those claims. In addition, the ABA's Board of Governors has recommended that state and local bar associations that have not already done so "give serious consideration to withdrawal or cancellation of all schedules of fees, whether or not designated as 'minimum' or 'suggested' fee schedules." American Bar News, Vol. 19, No. 5, p. 4 (June 1974). A number of jurisdictions have never had minimum fee schedules,

and several that had them have abandoned them since the initial decision in this case. *Id.* Furthermore, the Alexandria and the Arlington County Bars withdrew their minimum fee schedules in order to settle this case, and there is no indication that there has been any resultant flood of unethical conduct in those localities. Finally, other professionals, such as doctors and dentists, manage to maintain their ethical standards without any devices similar to minimum fee schedules. In short, even if necessity were sufficient to create an exemption, minimum fee schedules would not qualify.

If exceptions to the *per se* rule are needed for the learned professions, they should be created either by a federal statutory exemption, as Congress has done for other industries (Pet. Br. 31-34) or should arise only by strict compliance with the requirements of *Parker v. Brown*, 317 U.S. 341 (1943). At one point Fairfax appears to recognize the inter-relation between Virginia's regulation of the practice of law and a professional exemption (Br. 33). Nonetheless, it never connects its contention that the "practice of law is comprehensively supervised and regulated" with the defense in *Parker*, which is rooted in meaningful regulation by the State as an alternative to the antitrust laws. Instead it contends that self-regulation is a sufficient justification to apply the rule of reason to the learned professions where otherwise *per se* violations are involved, regardless of whether the requirements of *Parker* are met.[5] In like manner the ABA argues that

[5] Similarly, it suggests that "if the doctrine in *Parker v. Brown* does not apply here, the rule of reason is needed to provide a smooth interface between state regulation and antitrust enforcement." (Br. 56).

our position "ignores both the history and realities of professional self regulation" (Br. 16), but its own position assumes that this Court has previously approved such self-regulation in the context of the antitrust laws, when in fact that is not the case. Moreover, it fails to take into account the limited scope given to self-regulation by this Court in *Silver* and simply proceeds from the assumption that self-regulation by the professions is fully consistent with the Sherman Act.

One sentence in the conclusion to the ABA's brief points up the error of the claim based on self-regulation: "The Sherman Act was not intended and should not be interpreted to nullify such a political choice made by state governments." (Br. 16-17). If by "political choice", the ABA is referring to a legislative decision to permit the Virginia Bar to issue fee schedules as an alternative to free competition, then plainly there is no statute here similar to that in *Parker v. Brown*. It is a legislative judgment which is necessary, for as this Court stated in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 612 (1972), in declining to create a judicial exemption from a *per se* rule, "the judgment of the elected representatives of the people is required." That is precisely what happened in *Parker*, and that is precisely what has not taken place in this case and why the claim of self-regulation cannot stand.

* * *

The professional status of Sherman Act defendants is legally irrelevant where they are engaged in price-fixing, as respondents were here. The history and origin of minimum fee schedules in Virginia demonstrates that their inspiration is economic rather than the protection of the

public. As the *amicus* brief of the Texas Bar so nicely illustrates, minimum fee schedules are intended to produce "adequate compensation" for lawyers, a justification which is virtually identical to the claimed attempts to prevent "ruinous competition, financial disaster, evils of price cutting and the like" which this Court rejected as a defense when raised by the oil companies in *United States v. Socony-Vacuum Oil Co., supra,* 310 U.S. at 221. This Court has consistently rejected such attempts to interfere with the pricing mechanism in the past, and it should continue to do so in this case. If there is a need for a "learned profession" exemption from the antitrust laws, the case should be addressed to, and decided by, the Congress or the various State legislatures.

II. PETITIONERS ESTABLISHED THE REQUISITE RELATION WITH INTERSTATE COMMERCE TO SATISFY THE REQUIREMENTS OF THE SHERMAN ACT.

In its contention that petitioners have failed to meet the commerce requirements of the Sherman Act, Fairfax takes the position that there must be actual proof that the restraints imposed by the minimum fee schedule system adversely affected the interstate purchasing and financing of homes in Northern Virginia. It does not dispute the fact that there are substantial interstate aspects in the markets for purchasing and financing homes in Northern Virginia and that the restraints at issue are applied to an integral part of those transactions — the title examination which is required by virtually all lenders in Northern Virginia. But, according to Fairfax, petitioners are obligated to show more than this relation to interstate commerce to meet the test of the Sherman Act, and because they have not proven, for example, that the interstate

mortgage money market has been impeded by the operation of minimum fee schedules, petitioners can not prevail. We believe that the test proposed by Fairfax is unsupported by any decision of this Court and that to adopt it would result in a sharp curtailment of the jurisdiction of the of the Sherman Act.[6]

At the outset it is important to clarify our position. We have not contended, as Fairfax suggests, that "since a per se antitrust offense has been alleged in this case, a substantial effect upon interstate commerce should automatically be presumed" (Br. 17). We have argued only that, under *Burke v. Ford,* 389 U.S. 320 (1967), once a *per se* offense is shown, and that offense is shown to be directly connected to transactions with substantial interstate aspects to them, then the effects on those interstate aspects may be presumed and need not be proven. Thus, in *Burke,* plaintiffs established only that defendants had committed a *per se* offense by dividing wholesale liquor markets by territories and by brands, and that all the liquor for those

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[6] This Court's recent ruling in *Gulf Oil Corp. v. Copp Paving Co.,* ___ U.S. ___, 43 U.S.L.W. 4059 (decided December 17, 1974) was based on the "in commerce" provisions of the Robinson-Patman and Clayton Acts, and hence is not relevant to determinations under the "substantial effect on interstate commerce" test under the Sherman Act. See 43 U.S.L.W. at 4062, Slip. Opin. p. 8. This Court's reference in *Gulf Oil* to the need for a "particularized judicial determination" under the Sherman Act, 43 U.S.L.W. at 4064, Slip Opin. p. 12, requires no more than that interstate aspects of the case before the court be established rather than presumed, a requirement which petitioners plainly met through their evidence as to the interstate movement of homebuyers, mortgage money, and guarantees of loans.

markets had come from out-of-state. This Court held that the evidence was sufficient to meet the commerce requirements of the Sherman Act, observing that the "state-wide wholesalers' market division inevitably affected interstate commerce." 389 U.S. at 322.

Just as no further proof was required in *Burke*, petitioners here are required to establish no more than they have proven at trial. Given the extent of this restraint, which affected virtually every purchase of a home in Northern Virginia for the ten years that the fee schedules were in effect, it is difficult to imagine what "proof" of the kind Fairfax demands could ever be produced in this case, or for that matter could have been offered in *Burke*. Indeed, there may be no way to "prove" that a pervasive conspiracy involving a multitude of relatively small transactions like those at issue here has, even in the aggregate, a substantial effect on interstate commerce if proof of the kind suggested by respondent is required. On the other hand, the approach of this Court in *Burke*, utilizing a presumption of substantial effects where a *per se* violation restrains commerce with significant interstate components, avoids these essentially insoluble problems of proof. Furthermore, it insures that *per se* restraints operating on the local level, against what are parts of larger interstate transactions, will not escape Sherman Act liability.

As we demonstrated in our initial brief (pp. 48-53), the reach of the Sherman Act is exceedingly broad and is intended to cover every restraint that Congress could constitutionally prohibit through the Commerce Clause. There can be little doubt that Congress could constitutionally bring within the Sherman Act the restraints involved here which are integrally related to millions of dollars in interstate transactions each year. Therefore, petitioners have

established all that is necessary to sustain jurisdiction under the Sherman Act, and, accordingly, because Fairfax has sought to impose a far higher standard of proof regarding interstate commerce than the authorities require, its position cannot be sustained.

III. THE DOCTRINE OF *PARKER V. BROWN* DOES NOT IMMUNIZE THE CONDUCT OF EITHER RESPONDENT.

In its argument with respect to *Parker v. Brown, supra*, the State Bar treats the question as though the Bar were itself an agency of the Commonwealth of Virginia for all purposes, much as it does in its argument on the Eleventh Amendment. (See Point IV, *infra*). But the State Bar is very different from the typical state agency, principally because its sole responsibility is the regulation of the conduct of its members, all of whom are attorneys. In addition, the statute which sets forth the Bar's powers (Va. Code §54-49), does not make the State Bar a state agency but merely allows it "to *act* as an administrative agency" and then limits its functions as a state agency to enforcing rules and regulations issued by the Virginia Supreme Court.

There is no mention any place in section 54-49 of any authority to issue and promulgate the fee schedules or fee reports involved here, nor is there any authority to police the fee schedules issued by the local bar associations. We are simply at a loss to understand the basis of the claim of the State Bar that it "clearly has the power to regulate the legal fees to be charged through the rendering of ethical opinions, a duty imposed by statute." (Br. 11). It is true, as the State Bar points out (Br. 14-15), that section 54-48 authorizes the Supreme Court of Virginia to

adopt a code of ethics and that such authority has been delegated to the State Bar, but we are unable to see the basis upon which the State Bar concludes that "the legislature of Virginia has therefore, 'directed' the activities forming the basis for this complaint." (Br. 15). Indeed, section 54-51 of the Code of Virginia specifically prohibits the Virginia Supreme Court from adopting or promulgating "rules or regulations prescribing a code of ethics governing the professional conduct of attorneys at law, which shall be inconsistent with any statute; . . ." Therefore, the statutory authority under the Virginia Code is the same type of general authority held to be insufficient in *United States v. Oregon State Bar*, 385 F.Supp. 507 (D. Ore. 1974), to create a *Parker* exemption.

Although the majority in the court of appeals ruled that the State Bar was exempt under *Parker* because the Virginia Supreme Court had actively supervised its issuance of the fee reports and ethical opinions (App. B, p. 11), the State Bar makes no attempt to defend its activities on that basis, nor does it claim, as the district judge and the concurring judge in the court of appeals found, that it played only a "minor role" in these matters. (App. B, p. 21). Its *Parker* claim rests entirely on its assertion that as a state agency it cannot be liable for antitrust violations, a position, we submit, that is not supported either by *Parker* or any decision of this or any other court.

The position of respondent Fairfax on this issue is that "the Commonwealth has placed its stamp of approval on the use of advisory fee schedules for the legitimate purpose of complying with state-adopted Canons of Ethics and the Code of Professional Responsibility." (Br. 6). In fact, there is not the slightest indication that anyone on the

Supreme Court of Virginia or any other State Agency ever looked at any of the fee schedules promulgated by any of the local bar associations, including Fairfax, and each of the judges in the lower courts who has examined this question has found the *Parker-Brown* claim of Fairfax to be wanting. This is not a situation in which "Fairfax and its members are now caught between antitrust sanctions urged by petitioners on the one hand and state regulation on the other" (Br. 10-11), nor are they faced with "conflicting state regulation" (Br. 43). Neither is it correct that the fee schedules are "an integral part of state regulatory requirements" (Br. 42), nor that the State has "in effect necessitated local advisory fee schedules." (Br. 44). Whatever the force that argument might have had has been obliterated by Fairfax's voluntary abandonment of those "requirements" imposed by the State. The district court was clearly correct when it stated that the Fairfax Bar "has adopted a minimum fee schedule although it was under no compulsion to do so." (App. A, p. 5). Having made that decision, and having failed to obtain the requisite approval by an independent agency of the Commonwealth of Virginia, it is in no position to claim a defense based on *Parker v. Brown*.

IV. THE STATE BAR OF VIRGINIA IS NOT IMMUNE FROM LIABILITY FOR DAMAGES ON ACCOUNT OF THE ELEVENTH AMENDMENT

The State Bar claims that it is an agency of the State for Eleventh Amendment purposes, and hence the damage claim of petitioners against it must be dismissed.[7] Merely

[7] Nothing in the Eleventh Amendment operates to preclude actions in the state courts, subject to any state court sovereign immunity defense. However, the law is clear that the state courts have no

(continued)

because the State Bar is an agency of the State for some purposes, does not mean that the nexus between the State Bar and the State are sufficiently close to entitle the State Bar to protection under the Eleventh Amendment. As the court noted in *American Hospital Supply Corp. v. York County Inst. Dist.*, 123 F.Supp. 187, 190 (M.D. Pa. 1954), ". . . to say that the defendant is a State agency performing a governmental function or that it is a State instrumentality is not the equivalent of saying that it is entitled to the immunity of the Eleventh Amendment." See also *Ex Parte Young*, 209 U.S. 123, 155 (1909): ". . . the state is not a party to a suit [for Eleventh Amendment purposes] simply because the state railroad commission is such a party."[8]

Whether a state agency is entitled to the Eleventh Amendment immunity from damages that the State would enjoy will depend largely on whether the money to pay the judgment will come from the State or from an entity other than the State. See *Gordenstein v. University of Delaware*, 381 F.Supp. 718, 721 (D.Del. 1974); *Krisel v. Duran*, 258 F.Supp. 845, 849 (S.D.N.Y. 1966), *aff'd*, 386 F.2d 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042 (1968). Thus, in *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945), this Court stated:

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[7] (continued)
jurisdiction over actions under the Sherman or Clayton Acts, see *Freeman v. Bee Machine Co.*, 319 U.S. 448, 451 n. 6 (1943), and thus petitioners will be without a forum to recover their damages if the Eleventh Amendment applies in this case.

[8] While a state may waive its Eleventh Amendment immunity, see, *e.g.*, *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964), petitioners make no claim that there has been such a waiver in this case.

> . . . when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though the individual officials are nominal defendants.

This Court recently reaffirmed that view in *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), a case in which welfare recipients sought retroactive payments from a state agency:

> . . . a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.

The question in this case then is whether the funds which will pay any judgment will come from the "general revenues" of the State, *id.* at 665. Here, the State Bar has not alleged, nor is there statutory authority to support such an allegation, that the State itself would be liable for any judgment in this case. Rather, it appears that the judgment would be paid out of the special fund maintained for the operation of the State Bar — a fund whose monies are derived solely from dues paid by members of the Virginia State Bar (Va. Code §54-50), and are expended solely for the operation of the State Bar (Va. Code §54-52). The State Bar's financial independence from the general revenues of the State deprives it of any claim of Eleventh Amendment immunity from damages.

> This action will not and cannot in any way affect the Treasury of the State . . . That is the test of whether or not a suit is against the state. *Harrison Construction Co. v. Ohio Turnpike Comm.*, 272 F.2d 337, 340 (6th Cir. 1959).

In a number of cases involving agencies which had relationships to the State Treasury similar to that of the State Bar here, courts have held that because the agency is financially self-sustaining, and the State is insulated from liability for the agency's debts, the agency is not an "alter ego" of the State, and therefore suits against it are not barred by the Eleventh Amendment. See *Harrison Construction Co. v. Ohio Turnpike Comm., supra; Bowen v. Hackett*, Civ. Action No. 5038 (D. R.I. Jan. 16, 1975); *Raymond International Inc. v. M/T Dalzelleagle*, 336 F.Supp. 679 (S.D.N.Y. 1971); *S.J. Groves & Sons v. New Jersey Turnpike Authority*, 268 F.Supp. 568 (D. N.J. 1967); and *Zeidner v. Wulforst*, 197 F.Supp. 23 (E.D.N.Y. 1961).

A situation closely analogous to the case at bar was presented in *Bowen v. Hackett, supra*. There, plaintiffs sought to recover retroactive unemployment benefits from the State Department of Employment Security. The court concluded that any damages would come entirely from a special fund, which was supported by a limited class of persons (employees and employers), and hence the State's general revenues were not subject to reduction by any judgment which might be rendered. Accordingly, it ruled that the Eleventh Amendment did not constitute a bar to the relief plaintiffs sought, notwithstanding the fact that, as in this case, the State Treasurer was the custodian of the funds. Therefore, since the State Bar is financially independent of Virginia's general revenues and any judgment against it could be satisfied only from a special fund consisting of dues paid by its members, the Eleventh Amendment does not preclude petitioners' claim for damages against the State Bar.

V. THERE IS NO BASIS FOR RELIEVING RESPONDENTS FROM THEIR LIABILITY FOR DAMAGES BY MAKING THE DECISION PROSPECTIVE ONLY.

Respondent Fairfax contends that even if petitioners are able to establish that respondents' operation of the minimum fee schedule system violated the Sherman Act and caused petitioners actual monetary losses, relief should be limited to an injunction and declaratory judgment (Br. 59-63). In support of this position, it quotes broad language from *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and *Lemon v. Kurtzman*, 411 U.S. 192 (1973), but fails to discuss the factual settings in which those cases arose and neglects to mention two other decisions of this Court dealing with the issue of prospectivity under the antitrust laws, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969). A careful reading of these cases demonstrates that retroactive application of a new rule of law is denied in civil cases only in circumstances far different from the present case.

In *Chevron, supra*, the plaintiff had sustained an injury while working on an offshore oil rig, and it was not until long after the accident that he discovered the severity of the injury. Under the law of the Circuit at the time he filed suit, the timeliness of his action was not determined by a statute of limitations, but only by laches, under which the plaintiff concededly would not have been barred. Before the case came to trial, this Court rendered a decision directly contrary to a long line of cases in the Circuit in which the action was pending, and ruled that local statutes of limitations did apply in this type of case. The question in *Chevron*, then, was whether the statute of limitations ruling should be made retroactive, with the result

that an injured worker would be totally deprived of his remedy. In declining to bar the plaintiff in *Chevron*, this Court used the language relied on by Fairfax but did so in order to permit the injured party to have his day in court and not, as Fairfax would have it here, to permit wrongdoers to avoid making petitioners whole.

In *Lemon v. Kurtzman, supra*, an injunction had been obtained preventing the State of Pennsylvania from paying state funds to nonpublic, sectarian schools on the grounds that the Pennsylvania statute violated the First Amendment. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Plaintiffs then sought to prevent the State from reimbursing schools for the services provided prior to this Court's decision holding the statute unconstitutional, but this Court declined to grant that additional relief. In so holding, it relied on the fact that it would be inequitable to deny the schools reimbursement for money that had been spent in reliance on a clear legislative program, particularly since plaintiffs had abandoned their attempt to obtain a suspension of payments during the litigation and did not seek to prohibit further reimbursements until after this Court ruled in their favor on the merits. It also observed that in making the reimbursement there would only be minimal state involvement in church affairs, and therefore to allow the payment to the schools would not further undermine the constitutional interests at stake to a significant degree.

The trial court in this case twice rejected Fairfax's application for immunity from petitioners' damage claims (A. 3, 4). The correctness of that determination is amply supported by two antitrust decisions of this Court on the issue of prospectivity which are conspicuously absent from Fairfax's brief, *Hanover Shoe Inc. v. United Shoe*

Machinery Corp., supra, and *Simpson v. Union Oil, supra*. In *Hanover Shoe*, this Court set the framework within which this claim of prospectivity should be decided:

> There is, of course, no reason to confront this theory unless we have before us a situation in which there was *a clearly declared judicial doctrine* upon which United relied and under which its conduct was lawful, a doctrine which was *overruled* in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. 392 U.S. at 496 (emphasis added).

By way of emphasis this Court added that the doctrine of retroactivity should only be applied where the Court was "adopting a radically new interpretation of the Sherman Act," *id.* at 497, or where there "was such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an old one." *Id.* at 498.

These factors are simply not present in this case. No one contends that there is a prior decision of this Court holding that fee schedules are lawful under the Sherman Act. In fact, both the holding in *AMA* that the activities of doctors are subject to the Sherman Act, and Mr. Justice Jackson's statement in dissent in *United States v. National Ass'n of Real Estate Bds., supra*, 339 U.S. at 496[9] were ample notice that the use of minimum fee schedules at least raised serious antitrust questions.

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[9] "I am not persuaded that fixing uniform fees for the broker's labor is more offensive to the antitrust laws than fixing uniform fees for the labor of a lawyer, a doctor, a carpenter, or a plumber."

Although the Court has occasionally denied retroactive effect to its rulings, we are aware of no action seeking the recovery of monetary damages where relief was denied to the party who brought the case in which the new rule was announced. Thus, in *Simpson v. Union Oil, supra,* this Court reached a result directly contrary to Fairfax's position, observing that:

> The question we reserved [whether recovery should be retroactive] was not an invitation to deny the fruits of successful litigation to this petitioner. . . Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the litigation would be most unusual. . . . 396 U.S. at 14.

Similarly, even in the criminal law where a new rule may not be applied retroactively, the defendant who raised the issue is always granted relief since to do otherwise would remove the incentive for challenging illegal or unconstitutional actions and might raise questions under Article III. See *Stovall v. Denno,* 388 U.S. 293, 301 (1967).

Fairfax contends that retroactive relief in this case would be inequitable because lawyers all over the country might be subject to damage claims for their use of fee schedules. That argument, however, provides no support for the position that these petitioners should be denied the right to recover their own damages. Were this Court to find that retroactive application of relief to others would be inequitable, this Court has demonstrated that it can adequately fashion remedies to avoid such inequity. See *Linkletter v. Walker,* 381 U.S. 618 (1965). And if, as Fairfax suggests, the fee schedules were only used to determine a reasonable fee (Br. 50-52), there will be no damages to petitioners,

let alone the "ruinous" liability that Fairfax alleges will ensue (Br. 63).

Finally, if this Court should decide not to reject the claim of prospectivity as a matter of law as we urge it to do, petitioners are at least entitled to have the proceedings reopened so that they may demonstrate that there was no reliance by Fairfax of the kind that meets the tests enunciated in *Chevron* and *Lemon, supra.* In this respect it should be noted that this defense was never raised in Fairfax's answer, or by motion, or in any of its proposed findings of fact or conclusions of law submitted to the trial court, but was first advanced after the liability issue was determined against it.[10] Thus, petitioners were effectively denied the opportunity to offer evidence on this issue at trial since they were never advised that it was an issue in the case. While petitioners did not object to the introduction of correspondence with the Department of Justice on the issue of liability, we would strongly oppose its admission on the question of prospectivity, especially since the proferred exchange of letters is with the Arlington, not the Fairfax, Bar. Moreover, there is no showing that Fairfax was aware of the existence of the correspondence prior to this suit, let alone that it reasonably relied on it in issuing its fee schedule. There is, we submit, no proper basis upon which Fairfax's claim that relief should be prospective only can be decided in its favor at this time.

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10 In our view, the failure to raise this issue until after trial, and the absence of any excuse for not doing so previously, acts as a waiver of Fairfax's right to assert it. See *Jordan v. Weaver,* 472 F.2d 985, 995 (7th Cir. 1973), *reversed on other issues sub nom, Edelman v. Jordan, supra.* Unlike the Eleventh Amendment which this Court has held need not even be raised at all in the trial court, *Edelman v. Jordan, supra,* 415 U.S. at 677-678, a claim of prospectivity is not jurisdictional and hence must be raised in a timely manner like any other affirmative defense.

CONCLUSION

For the foregoing reasons and those set forth in our brief of December 20, 1974, petitioners submit that the decision below should be reversed and the case remanded for further proceedings with respect to petitioners' damage claims.

Respectfully submitted,

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